

VOL. XIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

10-CR-219S

TONAWANDA COKE CORPORATION
MARK L. KAMHOLZ,

Defendants.

Proceedings held before the

Honorable William M. Skretny, U.S.

Courthouse, 2 Niagara Circle, Buffalo,

New York on March 27, 2013.

APPEARANCES:

AARON J. MANGO,
Assistant United States Attorney,
ROCKY PIAGGIONE, Senior Counsel,
U.S. Department of Justice,
Appearing for the United States.

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JEANNE M. GRASSO, ESQ.,
ARIEL S. GLASNER, ESQ.,
Appearing for Tonawanda Coke Corporation.

RODNEY PERSONIUS, ESQ.,
Appearing for Mark L. Kamholz.

Also Present: Lauren DiFillipo, Paralegal
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1 (Jury not present in the courtroom.)

2 THE COURT: And I don't mind if there is a
3 little bit of activity going on, as long as it's
4 not too noisy. But I think the attorneys and
5 parties are back here.

6 You want to call the case, please, Colleen?

7 THE CLERK: Criminal case number
8 2010-CR-219, United States versus Tonawanda Coke
9 and Mark Kamholz.

10 THE COURT: Okay. Good morning to all.

11 MR. LINSIN: Good morning, your Honor.

12 THE COURT: All right. As far as where we
13 left off yesterday, I think as we sent you off into
14 the blue skies, I think, before it got dark last
15 night, we talked a little bit about the verdict
16 form and the charge. And I had given you the
17 documents relating to the changes that we suggested
18 on a number of the charges and asked to you take a
19 look at it.

20 I don't think, Mr. Moeller, we didn't get
21 anything from anybody yet?

22 LAW CLERK: Just the definitions from the
23 government.

24 THE COURT: Okay. All right. Do we have
25 anything to discuss as far as the proposed charges

1 are concerned?

2 MR. LINSIN: Your Honor, I apologize. I
3 didn't know you were expecting to get something in
4 writing from us on these. The only points that I
5 would raise were the ones we had mentioned during
6 our brief discussion yesterday, that we thought
7 that the -- there should be a parallel addition to
8 the introductory paragraph for Count 19 parallel to
9 what was added for 17 and 18.

10 And then with respect to draft charge number
11 57, it is our view that there should be two RCRA
12 instructions, one for 17 and then a joint one for
13 18 and 19. And we believe that the one for 17
14 should break out the two factual findings into two
15 elements, findings that are joined by the
16 underscored "and" in the draft charge. We believe
17 those are separate factual findings and should be
18 set out as two distinct elements.

19 Other than that, we are comfortable with the
20 modifications that are reflected in these draft
21 charges.

22 THE COURT: Okay. And I think, you know,
23 it's -- the timing to talk about this, I think, is
24 good. I'm not sure the jury is here yet.

25 Mr. Mango, you can live with that, I take it?

1 MR. MANGO: Yes, your Honor. With respect
2 to that count, I think we've discussed that in
3 detail already, so we can live with that. The one
4 thing that I did want to check into -- and there is
5 quite, actually, a complicated regulatory history
6 behind using that word "required." This is going
7 back to charge -- charge 54, which has all of the
8 RCRA counts in one, which I understand may -- well,
9 that may stay, because it's the indictment and the
10 statute. That may stay as is. It was, I believe,
11 57 that may get broken out.

12 But in 54, that term at the end, "Tonawanda
13 Coke Corporation without a required permit," we
14 would ask that "required" be taken out of that and
15 not used. It's not an element of the crime, that's
16 not what RCRA says, and there is this other
17 complicated regulatory history, which I can go
18 through. There is a Second Circuit case law
19 discussing whether the EPA has the ability even to
20 require someone to get a permit. But if there's no
21 objection, I don't think we need to go into that.
22 So I would just ask that "required" be taken out.

23 MR. LINSIN: Your Honor, I'm not going to
24 belabor this point. I believe that it would be
25 helpful, but I don't -- if -- I'm comfortable with

1 it reading "without a permit," so I would accede to
2 that recommendation.

3 THE COURT: Okay. Thank you.

4 Mr. Personius, you're on board?

5 MR. PERSONIUS: Yes, Judge.

6 THE COURT: Okay. Okay. And then I think
7 we're good.

8 MR. MANGO: Your Honor, the one thing -- I
9 don't know if we were going to discuss
10 separately -- move to the special verdict form.
11 The other item that you asked us to look into was
12 whether the entrapment by estoppel defense
13 statement should be in that. And we're prepared to
14 argue -- we forcefully believe it should not be in
15 the special verdict form. And if you want to hear
16 our argument, we can present that now, or if that
17 was going to be covered separately.

18 THE COURT: No -- the jury's here?

19 Okay. We still have a little time, so I'll
20 hear you out. I take it the defense position is
21 that the estoppel by defense addendum should be
22 included on all the charges but for the obstruction
23 of justice?

24 MR. LINSIN: It is, your Honor. We have
25 some recommendations as to how we believe it should

1 be incorporated. We think it is imperative that it
2 be included on each of those counts, and we have
3 some thoughts as to how that can be done without
4 being too cumbersome.

5 THE COURT: Okay. Do we have the draft
6 available on that? Yeah, the draft of the form --
7 of the verdict form with the added language? No,
8 we didn't do that? Okay.

9 Okay. Yeah, we had discussed it. Yeah, we'll
10 hear you out on that, and I'll hear the government
11 first with its opposition, and then we'll go
12 forward with a decision on it.

13 MR. MANGO: Thank you, your Honor. Your
14 Honor, I would note at the outset here that the
15 Second Circuit -- it is well settled in the Second
16 Circuit -- and I've got cases. The two principle
17 cases that I'll cite -- I have copies for defense
18 and the Court if you want them, or I'll give the
19 cite. In United States v. Bell, Second Circuit
20 case, 2009, 584 F.3d 478, the court said -- in this
21 case it's a very interesting case, because this was
22 a -- facts involved an execution of a search
23 warrant on a gas station, and a person who was in
24 the back room saw police come in with vests on
25 which said "police," but still was apparently under

1 the mistaken assumption that they weren't police.
2 He pulled a gun out, fired a couple of shots at
3 somebody, one of the police officers; they
4 exchanged fire. And then he was indicted on
5 assault. He was indicted on the attempted murder
6 of a federal officer.

7 And at -- at trial the court gave a general
8 verdict form, which, in fact, I think for most of
9 the counts in the indictment, this is a general
10 verdict form. Because for Count 1 it just says
11 here's the indictment, how do you find, guilty or
12 not guilty. So I think this is a general verdict
13 form for most of the counts.

14 And that's what happened in this case, in Bell.
15 And then the jury convicted the defendant of most
16 of the counts, not the attempted murder count, and
17 sua sponte, on its own, the district court, similar
18 to what we have here, your Honor, sua sponte raised
19 this issue. Said, "I think there was error in the
20 trial. I'm going to grant a new trial."

21 And in part of -- there was two reasons for
22 that. One, on that there was a flawed definition
23 of "intentional conduct," which doesn't relate, but
24 second, the use of a general verdict form rather
25 than a special form that would have addressed the

1 specific elements of the charged offenses and the
2 burdens of self-defense. Self-defense is an
3 affirmative defense similar to entrapment by
4 estoppel.

5 And the court goes on, the Second Circuit --
6 the government then appealed, because they believed
7 they had an appropriate conviction. The Second
8 Circuit weighed this and said, "Nor can we conclude
9 that the use of a general verdict form" -- also not
10 contested by the parties -- "was error of any sort
11 that could serve as the basis for ordering a new
12 trial. As it happens, there is a historical
13 preference for general verdicts and a traditional
14 distaste for special interrogatories in criminal
15 cases."

16 And it goes on to say, "The district court more
17 than adequately addressed the issue of self-defense
18 and its important [sic] for deliberation in its
19 charge to the jury."

20 THE COURT: What's the year of that case?

21 MR. MANGO: 2009.

22 THE COURT: Okay. I mean, that
23 traditionally has been the Second Circuit's
24 position. But, as you know, as things evolve with
25 issues in drug cases concerning whether or not

1 there's a controlled substance, whether or not
2 there's a certain threshold quantity that's met or
3 not met, and whether the jury unanimously finds
4 below or beyond -- above a threshold, the verdict
5 forms become a modified general verdict form so
6 that the juries can address that.

7 So while, you know, I understand that that
8 basically states the preference for general
9 verdicts where, you know, there are no other
10 issues, I'll take that into account. In fact we
11 talked about that last night in terms of the
12 circuit going on record in that regard.

13 But -- yeah, go ahead.

14 MR. MANGO: A couple more points, your
15 Honor, if I may. I'm sorry to impose on the Court
16 here. There is a 2008 Ninth Circuit case, United
17 States versus Ramirez. That's 537 F.3d 1075. And
18 in that case the court -- the defendant
19 specifically asked for a special verdict form on
20 the defense of self-defense, and the court refused
21 to give it. It went on appeal, and the Ninth
22 Circuit said it wasn't error to refuse that. Now,
23 I know that's the Ninth Circuit. In this case --

24 THE COURT: Yeah. It's not always good
25 law in the Second Circuit, as you know,

1 Mr. Mango -- the Ninth Circuit. And, in fact, I
2 mean, I learned my lesson, because I had a choice
3 just a couple of weeks ago on a case that hadn't
4 been -- or an issue that hadn't been really decided
5 in the Second Circuit. There was a Ninth Circuit
6 case and a Sixth Circuit case, and I went with the
7 Ninth Circuit rationale. Second Circuit thought
8 the Sixth Circuit was a little bit better. So, you
9 know, I'm going to be a little bit cautious on the
10 Ninth Circuit authority here.

11 MR. MANGO: I understand, your Honor.

12 But, more seriously, the point is that
13 yesterday the government -- and I don't want to
14 revisit the argument. It was settled. We objected
15 to the -- to the instruction of entrapment by
16 estoppel on all counts except for Count 16. I
17 mean, in the government's view it's not warranted.
18 There's no evidence, just for example, say for
19 Count 17, the storage around the tanks, that
20 somehow that was implicitly authorized. There's
21 nothing in any of the records that anybody saw
22 these tanks.

23 So that coupled with the decision -- and I'm
24 not going to say it right, but Abcasis, I think
25 it's Abcasis, where the court goes on to say that

1 this -- this defense of entrapment by estoppel
2 is -- is something that -- it should be used with
3 great caution. Great caution should be exercised
4 when it comes to the application of this defense.

5 And in this case -- and there's other cases,
6 actually a Hawaiian case, that cites Abcasis, which
7 talks about government malfeasance, which is
8 essentially the government's position here, that
9 they just -- they just didn't do the job, if
10 that's -- and that's the theory of entrapment by
11 estoppel -- that that doesn't warrant an entrapment
12 by estoppel defense.

13 So, again, I'm not trying to revisit that. The
14 Court has ruled; the instruction is ruled. But
15 when this -- if and when this goes to the Second
16 Circuit, with that language of "great caution
17 should be used when using this defense," and that
18 coupled with the Second Circuit's stated preference
19 that special interrogatories are distasteful and
20 should not be used, that put together I think is
21 going to present information to the Second Circuit
22 that -- that putting it directly in the special
23 verdict form went too far.

24 And that is the government's position. The
25 instruction is very clear. They're going to have

1 the instruction. It doesn't need to be in there,
2 because the number of different permutations that
3 we're going to need to figure this out -- are they
4 going to have to figure out the entrapment by
5 estoppel defense first, or are they going to have
6 to go through the elements of the charges, then hit
7 entrapment by estoppel? Is there going to be
8 language that says, well, if you still find the
9 defendants guilty -- because now, obviously, the
10 government has objected to the use of it. So I --
11 I could presume maybe that if there was -- let's
12 say, for example, they checked the box we do find
13 the defendants guilty or that they've met all the
14 elements, the government has met all the elements,
15 but we also find that this entrapment by estoppel
16 defense applies, I don't know -- I mean, I'm not an
17 appellate attorney. I don't know if the government
18 would be able to appeal that and reinstate the --
19 the fact that all the elements were found. I don't
20 know.

21 THE COURT: Well, I don't think it's that
22 complicated, frankly, to set it out. And the
23 Second Circuit in the case you cited didn't say
24 that it was error to have included a separate
25 inquiry of the jury. It just said that the general

1 verdict was okay. So -- but it had the caveat that
2 it would be the Second Circuit's position it should
3 be carefully considered.

4 You know, I'll look at the case, because, you
5 know, I don't know. But just from your account of
6 it, it still looked like there was an open door to
7 having included it. But --

8 MR. MANGO: Just one last point. In Bell,
9 your Honor, there was no special verdict form, so
10 they didn't weigh on whether it was error. But
11 they did say they weighed on whether -- because the
12 judge sua sponte said, "You know what, I should
13 have put this in the special verdict form." So, in
14 a sense, they kind of did, because they went on to
15 say the use of a general verdict form was not error
16 of any species --

17 THE COURT: Right.

18 MR. MANGO: -- and did not warrant a new
19 trial, and went on to say that these instructions
20 the court gave on self-defense were clear and
21 called attention to the very issue of self-defense.

22 So, in essence, the Second Circuit kind of did
23 say in that case you didn't need it.

24 THE COURT: Well --

25 MR. MANGO: Maybe. Maybe you didn't need

1 it.

2 THE COURT: The facts are different. The
3 verdict was already rendered. You know, a lot of
4 distinctions. But, I mean, I'll look at it
5 carefully. I don't know, because I don't know the
6 case, but from hearing your account, I know you can
7 make some distinctions.

8 Mr. Linsin?

9 MR. LINSIN: Thank you, your Honor. I
10 don't have the Bell case in front of me. I do
11 believe, given Mr. Mango's account, that a review
12 of this issue post-verdict when neither party
13 apparently had requested or objected to a special
14 verdict form prior to the matter being submitted to
15 the jury, I think puts us in a very different
16 posture here. We're obviously having this
17 discussion before the matter is submitted.

18 We are strongly of the view that this would
19 be -- is both required and would be very helpful to
20 the jury for -- candidly, for the very reasons
21 Mr. Mango has just described. What is the jury to
22 make of this defense and how does it apply? How
23 should it be considered count by count for the
24 counts that it relates to?

25 So we don't believe that the Bell case, at

1 least from what I understand, would be controlling
2 here. We believe that without it being cumbersome,
3 and similar in some respects, your Honor, to the
4 manner in which the Court has addressed the need
5 for special findings in Counts 17, 18, and 19 with
6 respect to the penalties provisions of that
7 statute. Those special findings are built into the
8 form. As the Court has understood, they are
9 required, based upon the manner in which fines
10 could potentially be calculated.

11 We believe that for each of these counts, with
12 some -- perhaps some supplemental language on the
13 very first page of the verdict form itself, that
14 the form could -- could easily say after the
15 statement of the charge, if the jury unanimously
16 concludes that the government has not proven this
17 charge beyond a reasonable doubt, and then just
18 direct them to what would be perhaps designated as
19 Part C -- to this Part C that would say how do you
20 find on Count 1 as to each defendant, guilty/not
21 guilty. If the government hasn't proven their
22 case, the jury would be directed to that portion of
23 the form. If you conclude that the government has
24 proven this charge beyond a reasonable doubt, then
25 direct the jury to what would be Part B, and then

1 ask, has the defendant -- has the defendant proven
2 the defense of entrapment estoppel with respect to
3 this charge by a preponderance of the evidence;
4 yes/no.

5 And then the flow would then direct them to
6 Part C. And there would need to be, I think, some
7 preliminary guidance as to what a "no" decision
8 would mean in that Part B, but I think this could
9 be -- the jury could be directed to how they should
10 make these assessments pretty simply and without
11 any -- without unnecessarily complicating the form,
12 but providing proper legal guidance to the jury as
13 to just what their decision process should be.

14 THE COURT: Yeah. I mean, that's
15 essentially what I think would work. And I think I
16 know how we would like to see it. I would
17 circulate it just to have you look at it, because I
18 think we were pretty close last night to getting it
19 clear.

20 But I want to look at Bell. So I think, you
21 know, I have the parties' positions, and I think
22 that's -- yours included, Mr. Personius?

23 MR. PERSONIUS: Judge, yeah. The only
24 thing I would note, Mr. Mango was kind enough to
25 give us a copy of the Bell decision.

1 THE COURT: Right.

2 MR. PERSONIUS: If you read further from
3 the portion he quoted, at pages 484 through 485,
4 the Second Circuit notes the charge that was given
5 in Bell. And also I think Bell is different
6 because the -- I don't know self-defense federally,
7 but from reading this, the defense doesn't have any
8 burden on that to prove it. It's that the
9 government has to prove beyond a reasonable doubt
10 that there wasn't self-defense. I think it's
11 different than what we have here. And I think at
12 484, 485 it makes that clear that there was a
13 different consideration there.

14 THE COURT: Okay. All right. Well, you
15 know, what I'll do is I'll take a few minutes now,
16 and, you know, we'll kind of, from a chambers
17 standpoint, decide how we're going to proceed. I
18 understand the respective arguments. And then just
19 in a few minutes we'll have the jury come out.

20 MR. LINSIN: Your Honor, the only
21 additional point I would ask for the Court's
22 consideration is with respect to Count 17. And as
23 we had discussed kind of in the abstract yesterday,
24 we do believe with respect to Count 17, and
25 assuming we are adding in this element of finding

1 that there was active management, just a direction
2 that there be a unanimity determination as to what
3 action that -- a -- a confirmation that there has
4 been a unanimous decision as to what action
5 constituted active management.

6 MR. MANGO: And, your Honor, the
7 government doesn't feel that is necessary. Again,
8 the point of this verdict form is to keep it
9 simple. Just listening from Mr. Linsin's
10 description before of this entrapment by estoppel
11 addition and then this addition, this -- this form
12 is not going to be something that's going to be
13 easy for them to work through. I'd like to see the
14 draft form, obviously, before it goes. But there's
15 no requirement that they need to be unanimous as to
16 what active management is.

17 THE COURT: Well, I mean, there are some
18 cases, and I -- I just can't call them to mind
19 right now, that -- where there are several options
20 that the court does require without unanimity with
21 respect to the jury's action on those different
22 options. But I'm not sure that I recall anything
23 other than a charge to the jury, rather than a
24 statement on the form relative to that.

25 So I want to take a look at it from that

1 standpoint. I know you want it on the form, if I
2 understand you correctly. But --

3 MR. LINSIN: Your Honor, this is the one
4 element in the one count, I believe, where there
5 are a variety of different options as to the
6 particular conduct that could be considered as
7 active management. So that is why we think it
8 should be particularized on this count.

9 Perhaps a general unanimity instruction would
10 be sufficient, but I think -- I think it is of
11 particular significance for this element on this
12 count just because there has been such a wide
13 variety of evidence as to what does and what
14 doesn't constitute active management, and differing
15 time frames when that conduct occurred.

16 THE COURT: All right. Well, I mean,
17 it's -- I mean, frankly, I know where you're coming
18 from. It's been a little bit troubling to me. I
19 just -- I'll have to work out how I want to handle
20 it. Okay?

21 MR. LINSIN: Thank you, your Honor.

22 THE COURT: All right. Thank you for your
23 input.

24 Andrew, is there anything else?

25 LAW CLERK: No.

1 THE COURT: Okay. I'm going to target
2 10:15 to start. Okay?

3 MR. PERSONIUS: Judge, if it's helpful,
4 and I hope this isn't a problem, I went through my
5 closing this morning. I think I told you about a
6 half an hour. It's at least an hour.

7 THE COURT: That's okay.

8 MR. PERSONIUS: I'm sorry.

9 THE COURT: Whatever the time is, it is.
10 Okay. I think we ran over a little bit
11 yesterday on approximations, and I just hope that
12 we don't run over the extended approximation, but
13 whatever you have to do, I mean --

14 MR. PERSONIUS: My prediction right now,
15 your Honor, would be 60 to 70 minutes.

16 THE COURT: Okay. All right. And then
17 you have rebuttal, Mr. Piaggione?

18 MR. PIAGGIONE: Yes, your Honor.

19 THE COURT: Okay.

20 MR. PIAGGIONE: And depending on what I
21 hear, it might affect the length of my rebuttal.

22 THE COURT: All right. Well, that's what
23 rebuttal is for, Mr. Piaggione.

24 MR. PIAGGIONE: Thank you.

25 THE COURT: Okay. Thank you.

1 MR. LINSIN: Thank you, your Honor.

2 (Short recess was taken.)

3 (Jury not present in the courtroom.)

4 THE COURT: Okay. Thank you. Please have
5 a seat.

6 Okay. We're reassembled, and the attorneys and
7 parties are back present. Is there some matter
8 relating to the proposed jury verdict form that you
9 want to call to my attention?

10 MR. PERSONIUS: Yes, Judge. And thank you
11 for coming out. I was reading further the Bell
12 decision that the government was kind enough to
13 provide to us, and then I've had a chance to talk
14 to Mr. Linsin about it and, actually, Mr. Mango
15 too.

16 And what the court indicated in -- the trial
17 court indicated in the Bell decision to the jury
18 was, actually, you might want to consider the
19 self-defense issue first. In other words, don't do
20 that last. Consider that first. And it caused me
21 to wonder if here if the jury shouldn't be given
22 the option, in terms of how they address, whether
23 they address the beyond a reasonable doubt for the
24 particular count first or whether they address the
25 defense of entrapment by estoppel first, that they

1 shouldn't be required, necessarily, to reach a
2 guilty verdict on a particular count before they
3 consider the entrapment by estoppel defense.

4 I don't think there's any requirement.
5 Certainly, it wouldn't make sense that they would
6 have to do that. And that the jury should be
7 informed that there's no particular procedure that
8 they have to follow in considering guilt on the
9 count versus the entrapment by estoppel defense
10 with respect to that count. And I just wanted to
11 bring that to your attention that that was a
12 thought we had.

13 THE COURT: Okay. Do you want to comment?

14 MR. MANGO: Brief comment, your Honor. I
15 haven't found any Second Circuit case except for
16 George, which was cited by the defendants in their
17 request for the additional instruction. This is
18 the George case, 2004 Second Circuit case, in which
19 the district court gave -- this is -- this is the
20 extent of the instruction the district court gave
21 on entrapment by estoppel: "If you believe that
22 Mr. George was trying to comply with the law by
23 following the instructions of the person to whom he
24 submitted his passport application, and you believe
25 that a reasonable person desirous of obeying the

1 law would have accepted those instructions as
2 accurate, then you may not convict Mr. Gorge based
3 on the fact that the number was not his actual
4 Social Security number."

5 That's it. That's all we have from guidance
6 from the Second Circuit. Now, obviously, your
7 instruction goes beyond that.

8 THE COURT: It's pretty strong and
9 detailed.

10 MR. MANGO: Yeah. And I'm concerned that
11 now if we go to the next step and actually tell the
12 jury how they should weigh this, this gets back
13 to -- this is a separate Second Circuit case, which
14 gets back to why the Second Circuit does not like
15 special verdict forms. This is a 1958 case, United
16 States v. O'Looney, 544 F.2d at 392. I don't have
17 the first -- first page of it. But it said the
18 court elaborated on the reasoning and indicated
19 that special verdicts tend to infringe on certain
20 historic functions of the jury, to temper the law
21 with common sense, to decide whether to follow
22 instructions, and to reach a general verdict
23 without enunciating its reasons.

24 That's very important. So the more we mess
25 with that, the more we're taking away this jury's

1 historic function. And that's why we would be
2 concerned with actually telling the jury, well, you
3 may want to look at this first and then go through
4 everything else. And why it shouldn't be in the
5 verdict form.

6 THE COURT: Well, you know, I wasn't at
7 the Supreme Court arguments yesterday, but they
8 seemed to be concerned about new developments, for
9 example, in relationships. And, you know, there's
10 been a lot of new developments in the law since
11 1958 and the O'Looney case, you know, which I think
12 we have to be sensitive too. This is what, only
13 the second criminal Clean Air Act prosecution in
14 history. Right? So I think we've got to take that
15 into account, and we've got to look at this
16 carefully.

17 I do agree with you, though, that the charge on
18 the estoppel by entrapment defense is a strong
19 charge, and I think a good charge. Do we need to
20 adjust the verdict form? I'm not sure. We're
21 going look at it carefully. I'll look at Bell.

22 MR. MANGO: Thank you.

23 THE COURT: I think one concern is, and, I
24 mean, is there evidence here that would -- that's
25 been introduced by either side in this case that

1 would apply to all the counts but the -- but for
2 the obstruction of justice charge? And I want to
3 make sure that there's an argument to be made that
4 there is before we consider that entry on the
5 special verdict form.

6 Mr. Mango?

7 MR. MANGO: Right. That's very much why
8 we raised the issue yesterday and again quickly
9 this morning, your Honor. Because -- because these
10 are issues that are -- if it goes a certain way,
11 may be, you know, under the microscope in the
12 Second Circuit. And this is an expansion, in the
13 government's view, of the entrapment by estoppel
14 defense. There's no case law out there, in the
15 Second Circuit, certainly, that says -- and think
16 about it in the environmental context, that the
17 precedence this case is going to set is that in
18 every -- in every environmental case you have --
19 you have a duty on government, either local, state,
20 or federal, to go out and do inspections. And by
21 the fact that they now missed it over, you know, 20
22 years, 30, however many years you want to talk
23 about, even five years, one year, if it's multiple
24 inspections, this case is now going to stand for
25 the precedence that in any environmental case

1 there's this entrapment by estoppel --

2 THE COURT: Well, I mean, that's factually
3 distinguishable. I mean, you have some pretty
4 aggravated circumstances here in terms of a
5 long-standing situation where you don't catch
6 certain violations or, you know, allegedly certain
7 violations, and there was a lot that was going on
8 that was known by the DEC people and that didn't
9 become known to the EPA people, I think is what the
10 defense is going to argue.

11 So I want to balance that. I've got to take a
12 close look at it. I don't agree that this
13 necessarily is bad precedent, but I just want to
14 make sure that it's the right thing to do under the
15 circumstances.

16 MR. MANGO: I'm not saying bad precedent,
17 your Honor. I'm just going to say it expands the
18 entrapment by estoppel. But, for example, say in
19 Count 17, the storage count, there's been no
20 evidence that DEC -- and it's the defendants'
21 burden -- that there's been no evidence that in
22 1998 DEC was told about this, the storage of the
23 D018 on the ground. There's nothing. There is
24 nothing in the 30 days of trial we have. And so
25 it's not warranted with that count.

1 THE COURT: What was the date of that
2 storage?

3 MR. MANGO: 1998 it starts. That's the
4 day we, which we didn't get into it, that the deer
5 got covered in coke breeze and the -- you know,
6 there's no indication that defendant ever said,
7 hey, we've got these tanks --

8 THE COURT: But they were on premises
9 after 1998.

10 MR. MANGO: Not in that area. There's no
11 evidence they were in that area though. We've got
12 a 188-acre site. And they were there in 2009.
13 I'll grant that. And they saw it in 2009, sure.
14 But starting in 1998, no.

15 THE COURT: Okay. Well, I mean, that's
16 part of my concern, so I've got to look at that
17 carefully.

18 MR. LINSIN: Well, your Honor, as to that
19 particular point, there clearly is evidence that
20 they were on-site repeatedly after 1998. If, as
21 Mr. Mango says, the evidence isn't there to show
22 that we've established the necessary elements for
23 this defense, then the jury will make quick work of
24 it. Then that's a simple matter, and there's no
25 prejudice to the government. But the evidence

1 certainly is there, and I -- that -- that the DEC
2 officials were on this site repeatedly after that
3 date. Clearly in 19 -- 2009 there were explicit
4 discussions about the materials in this area.

5 And the point I wanted to add to what
6 Mr. Personius raised, and what I was thinking about
7 as he was discussing this Bell matter, is this,
8 your Honor. None of us, I believe, want to see an
9 unnecessary retrial of this case. What I became
10 concerned about as I was reflecting on this is,
11 if -- if we have jurors -- if for some reason the
12 jury is not able to reach a unanimous verdict with
13 respect to a given count, they shouldn't be told
14 they have to stop there. The jury should be able
15 to consider this defense with respect to that
16 count, regardless of whether they have reached a
17 unanimous guilty/not guilty verdict on that count.

18 And that is the point I think is important. It
19 hadn't been captured as I reflected on this special
20 verdict form, and what I think the Court's
21 instruction should guide them that they are
22 permitted to consider the defense even if they
23 haven't reached an unanimous verdict. I would hate
24 to see a special verdict form that requires
25 unanimity on a not guilty or guilty and prevents

1 them then from considering the defense, so we wind
2 up with a hung jury that hasn't even considered the
3 defense. And I think we have to be sensitive to
4 that as we are considering the guidance to give to
5 the jury.

6 THE COURT: All right. Well, you know, it
7 seems to me that we really have an engaged jury.
8 And I can't imagine a case where the jury would be
9 any more engaged than this jury appears to be,
10 okay, from my observations. And the crux of the
11 questions that have been asked, essentially, is
12 give us a little assistance, give us a little help.
13 And I don't think, frankly, the Second Circuit can
14 be critical of attempts to do that. But we have to
15 be right.

16 Like, for example, what you were just referring
17 to, Mr. Mango. I'm not sure being on-site is
18 sufficient for purposes of the entrapment defense
19 without there being disclosure associated with
20 that. So, you know, I'm not sure it would be
21 proper to include a reference to the entrapment
22 defense if there is an absence of evidence with
23 respect to disclosure.

24 MR. LINSIN: But, your Honor, the count
25 runs for an extended number of years.

1 THE COURT: Yeah.

2 MR. LINSIN: And disclosure during any
3 portion of that count, I believe, would -- would
4 trigger the applicability of the defense. It is
5 not -- it is not required that -- you know, this
6 isn't a year-by-year count as some of these other
7 counts are. This is '98 to 2009. And our point is
8 that this -- that we have multiple visits on-site
9 during that period of time, and then we have an
10 explicit discussion and engagement of the
11 regulators down by those tanks in 2009 as to what's
12 going to be done with this material. And so we
13 certainly have notice during the time period that
14 is alleged in the count.

15 And so we think that that satisfies the
16 requirements -- the threshold requirements of at
17 least raising the defense and then leaving it to
18 the jury to make a factual determination as to
19 whether we satisfied the elements.

20 THE COURT: And maybe it does. But that's
21 certainly at the tail end of the ten-year period,
22 if you will.

23 MR. LINSIN: Well, the specific visit to
24 the tanks is, your Honor. The other visits to the
25 site come, as the Court will recall, at a number of

1 different intervals.

2 THE COURT: But that's what I -- I don't
3 think that's enough. Site visits, absent presence
4 at the tanks, big distinction, in my mind, at
5 least, at this point. I mean, I --

6 MR. LINSIN: Well, your Honor, it is a
7 distinction, but the truth is, the evidence before
8 the jury is that we have RCRA compliance inspectors
9 at the facility for multiple hours on a number of
10 different occasions. And I think -- I don't think
11 it's fair to the jury to just cut off what may be
12 reasonable inferences from that information derived
13 from the inspection reports and the understanding
14 as to what these RCRA inspectors are charged with
15 doing when they go out to these facilities. There
16 may well be reasonable inferences that can be drawn
17 from that direct evidence.

18 MR. MANGO: Real brief, your Honor?

19 THE COURT: Just give me one second so I
20 can try to straighten this out.

21 Yeah, but interjecting reasonable inferences
22 upon inferences to get to the kind of defense
23 that's being urged or argued here, I mean, frankly,
24 is a cause for concern for me. I mean, because
25 there is no direct evidence. And maybe the DEC

1 people should have been out there, you know,
2 looking at, you know, the different areas that we
3 have no evidence about. But -- but we don't have
4 any evidence that they were there. And to say that
5 that's sufficient to trigger a consideration of the
6 entrapment defense, I'm not yet convinced.

7 Let me hear what you have to say.

8 MR. MANGO: Your Honor, it was picking up
9 on that point, that this -- this is such a serious
10 defense. It's -- the impact of it is so
11 monumental. I mean, it's discussed in the Second
12 Circuit case law that it can't be based on
13 reasonable inferences. It's got to be based on
14 that disclosure at the time or before of the
15 authorization by the government. It's very clear.
16 You've spelled it out very clearly in your
17 instruction. You can't -- you can't have
18 inferences as part of this. And I think that is
19 captured in the language that the Second Circuit
20 uses as to how sparingly this defense should be
21 used and such.

22 THE COURT: Yeah. But my concern, too,
23 is, this is a very unique type of case. These kind
24 of administrative criminal prosecutions are
25 different, and we have to consider that. I mean,

1 it's not an attempt murder case. It's just not.
2 All right. And that's why this kind of precedent
3 can be positive precedent, but I'm not even worried
4 about the precedential part of it. I want it to be
5 right so this jury does what's right for both sides
6 of this case. And that's why there's so much at
7 stake here, okay.

8 But I appreciate the input, and we'll work it
9 out.

10 Okay. Andrew, is there anything else that we
11 should touch base with?

12 LAW CLERK: No, Judge.

13 THE COURT: All right. Okay. I think
14 we'll leave it at that. I think we're ready to
15 start with the jury, if you would, Chris, please.
16 Thank you.

17 (Jury seated.)

18 THE COURT: Good morning. Have a seat
19 please. What did I tell you, we would start
20 promptly at 10:30. I said not a minute later,
21 maybe two minutes. Right, didn't I tell you that?
22 Okay.

23 All right. Good to see you. And I hope you're
24 ready. We have two more closing arguments, okay?
25 And we're going start with Mr. Personius.

1 And the attorneys and parties are back,
2 present. As you know, you can use the notebooks,
3 but very important that you focus on the fact that
4 whatever you put down now is not evidence. That's
5 just simply a guide, if you choose to use the books
6 at all, and make sure that's clear in your notes.

7 Again, please don't prejudge the case. You
8 still have more to hear. You still have to get --
9 and all the attorneys have referenced what I'm
10 going to be giving you in my charge, so we're going
11 to take some time and we're going to work through
12 that. And then you have to go about applying that
13 law, working through the counts, following the form
14 that I give you with respect to how you consider
15 the evidence in light of the count. I'll be
16 telling you different things as I define terms for
17 you a little bit later, and I'll tell you more
18 about the charge at that time too.

19 But you look ready. I mean, I haven't seen you
20 look this ready in I don't know how long. So thank
21 you for your attention. You know, you've been
22 really terrific, and, you know, yesterday was a
23 relatively long day in terms of taking in
24 everything that the attorneys had for you
25 yesterday. But again, we thank you for your

1 engagement. You've been terrific. Please bear us.
2 We've got two more arguments.

3 The attorneys and parties are back, present.
4 You are here, roll call waived. And I think we're
5 now, Mr. Personius, waiting for your closing
6 argument.

7 MR. PERSONIUS: Thank you, Judge. May it
8 please the Court --

9 THE COURT: Yes, you may proceed.

10 MR. PERSONIUS: -- Mr. Mango,
11 Mr. Piaggione, Mr. Linsin, Miss Grasso, good
12 morning members of the jury.

13 Over the next -- it will be about an hour or
14 so, two TV shows, that I'm going talk to you. And
15 I want to you talk to you about four things. You
16 want to hear about the obstruction count, I know
17 you do, so that's the first thing I'm going to talk
18 to you about. There's been an effort, in my
19 judgment, through this case by the government to,
20 for lack of a better term, throw dirt on Mark
21 Kamholz. I've identified a dozen instances where
22 that attempt was made. I feel obliged to address
23 each of those, because I think it's important in
24 terms of what you think about Mr. Kamholz as you go
25 to deliberate. I think it's also important in

1 terms of assessing the quality of the evidence that
2 the government has given to you and the arguments
3 that the government is making about that evidence.

4 Because as the Judge has told you repeatedly
5 and you know this, this is a very, very important
6 matter. This isn't some law school hypothetical
7 where you can pick and choose what you want from
8 the evidence and ignore the rest of it. You've got
9 to look at the whole body of the evidence, and as
10 the Judge says, apply your common sense and your
11 experience and your intelligence to that evidence.

12 The third point that I'm going to address with
13 you is this entrapment by estoppel defense, because
14 it says an awful lot about the way we approach --
15 Mr. Linsin and I and Miss Grasso, how we approached
16 this case has a lot to do with that defense. I
17 want to make absolutely certain you understand what
18 that theory is.

19 The last thing I'm going to do is to go through
20 just a few examples of the evidence that the
21 government has presented, and the point being that
22 you've been told by the Judge what reasonable doubt
23 means. And in essence what it means is it has to
24 be of such quality -- the evidence has to be of
25 such quality that you wouldn't hesitate to rely

1 upon that evidence in an important matter. In
2 simple terms, that's what it is. And my point is
3 with the evidence you're getting from the
4 government you most surely in an important matter
5 would hesitate to act.

6 So let's get to the obstruction, and then we'll
7 move through these other points, and then I'll sit
8 down. But I'm not going to be as brief as I was
9 during my opening.

10 Okay. If anybody ever came to any of us and
11 they were upset about something that somebody had
12 said, you would never ever, ever, ever, even in
13 some casual setting, you would never make a
14 judgment on that person or what that person
15 intended without asking questions. And the kind of
16 questions you would ask is well, when the person
17 made that comment, what were the surrounding
18 circumstances? What had you been talking about
19 before that? What did you talk about after that?
20 And if it had to do with some action you took based
21 on what that person said, you'd want to know what
22 happened after that.

23 You'll remember that when I was questioning
24 Mr. Cahill, who is the critical witness, of course,
25 on this, that in a fashion I asked him do you agree

1 that actions speak louder than words. And in
2 considering the obstruction count, the point I'm
3 getting to is you cannot take in isolation whether
4 it's six words or nine words or whatever it is that
5 Mr. Kamholz said to Mr. Cahill back on what we
6 understand was April 10th, 2009, in the by-products
7 area and ignore everything else that surrounds
8 that.

9 You have to consider the entire context of what
10 was said, and you have to go back, I want to
11 suggest historically, to get an understanding of
12 what Mr. Kamholz's understanding was at the time he
13 walked through the by-products area back in April
14 of 2009.

15 Now, you've heard from the evidence that
16 Mr. Kamholz has been working at Tonawanda Coke for
17 about 30 years, and for that whole period of time
18 he's been the environmental compliance officer.
19 We've heard from the evidence that -- and you can
20 see it in the overhead photograph -- it's a big
21 place. It's about 150 or more acres. It's a large
22 facility. It occupies a lot of land. You saw from
23 the photographs where his office is, Kamholz's
24 office is, versus where the main part of the
25 operation is.

1 It's a distance, and what you heard from Mr.
2 Foersch is if -- you heard this from Mr. Carlacci
3 too, if you're in the office area, you don't walk
4 over to that other part of the plant. You drive
5 over there. And this isn't to suggest that
6 Mr. Kamholz wasn't in and around the plant.
7 Obviously he was. But one of the questions is with
8 what frequency?

9 And if you'll recall, at least what I recall
10 from the evidence is that what Mr. Cahill testified
11 to is that during the 15 or so years that he worked
12 in the by-products area, both as an operator and a
13 foreman, he would see Mr. Kamholz in the
14 by-products area. At one point he said --
15 initially he said once a month. Then he said once
16 every three months to take a test. That's what
17 Mr. Cahill testified to.

18 So just because -- this is one of the dangers
19 in a trial like this is that you take 30 years of a
20 person's work experience, 30 years of activity at a
21 coking plant, and you compress that into four
22 weeks. And in that four weeks you talk about
23 isolated components of that facility's operation,
24 this pressure relief valve, the two quench towers,
25 and whether or not they had baffles, and they did

1 not have baffles. We know that. This coal tar
2 sludge from the openings, the decanter tar sludge,
3 what happened with that, and then these two
4 abandoned tanks.

5 We've taken four or five components of this
6 huge operation, we focused on those over the four
7 weeks, and do not slip, do not slip into thinking
8 well that's all Mark Kamholz had to worry about day
9 in and day out. Recall that this plant has to run
10 24 hours a day, seven days a week, 12 months a
11 year, 365. It's running all the time. If you
12 don't do that, apparently these ovens fall apart.
13 So it's running all the time.

14 Mark Kamholz doesn't work 24 hours a day or
15 seven days a week or anything like that. He's a
16 regular shift employee who works an eight-hour day,
17 five days a week. But guess what? The
18 environmental issues at Tonawanda Coke don't just
19 arise when he's working. They arise all day long.
20 And he's there for just a fraction of the time to
21 deal with all of these issues, and not just with
22 what's going on with the quench towers, or what's
23 going on with the PRV, or what's going on in the
24 by-products area.

25 So what he knows about any particular operation

1 you cannot assume he knew anything and everything
2 that was going on in by-products, especially when
3 you know from Mr. Cahill, what I recall, is that he
4 would only come -- Mr. Kamholz would only come to
5 by-products once every one or once every three
6 months.

7 So, in addition to that, this is a coke plant.
8 It's an old coke plant. We've seen pictures. It's
9 close to a hundred years old. This thing has been
10 around. And being a coke plant -- Mr. Sitzman made
11 a comment. He said it has coke smells. He's been
12 around coke plants. He knows what a coke plant is.
13 It's not a place that you want to take your kids to
14 play. It's a coke plant.

15 And the nature of the operation is that it's
16 going to have issues. It's going to have a lot
17 more issues than some other type of manufacturing
18 operation is. By definition, it's going to have
19 issues. And who is in charge of dealing with all
20 of those issues? It's Mr. Kamholz.

21 So, it's against that backdrop that I ask you
22 to consider this obstruction charge. And then in
23 addition to that, recall that Mr. Foersch, whom we
24 called as a witness because we felt it was
25 important. Who was the 30-year face of the

1 Department of Environmental Conservation at
2 Tonawanda Coke? It was Gary Foersch. Who called
3 him to testify? The defense called Mr. Foersch to
4 testify. That in itself speaks volumes about the
5 government's case.

6 But what you heard from Mr. Foersch was that
7 his focus while working at Tonawanda Coke was on
8 the ovens. The ovens is where you get all these
9 emissions. They're coming out the doors and the
10 lids. That's where the real concern is. It would
11 make sense, and I think the evidence would support
12 the fact that that's where Mr. Kamholz's principle
13 concern would be also.

14 So, in any event, the reason I point all that
15 out is it would be unfair to Mr. Kamholz, it would
16 be inconsistent with the evidence to assume that he
17 knew anything and everything about the whole plant
18 and what was going on, much less anything and
19 everything about what was going on in by-products.

20 So he gets a letter from Miss Hamre,
21 April 8th I think it was, that said -- maybe a
22 phone call too -- says we're coming out to do an
23 inspection. And we're concerned about emissions,
24 so we're going to focus on the by-products area.
25 He gathers some documents together that she's asked

1 for, and he does what I think you would expect he
2 would do, which is he goes to the by-products area
3 and he tells Mr. Cahill, who is the foreman of the
4 by-products area, who's been working there for 15
5 years, had been the foreman for six -- I don't
6 know, six or seven years at that point in time.
7 And he says we're going to have an inspection.
8 Some people from the EPA are coming in, and let's
9 take a look at the by-products area.

10 Now, let me step back for a minute too because
11 this was suggested. It was suggested that
12 Mr. Kamholz somehow had a concern about emissions
13 because there had been this visit a year earlier.
14 There was a visit May 28th of 2008. Mr. Carlacci
15 came with Mr. Sitzman and Miss Webster, and
16 Mr. Foersch was there too. And it was a visit, not
17 an inspection, and they talked about emissions and
18 the concerns that they had. And I think there's
19 some suggestion that Mr. Kamholz had in the back of
20 his mind that he was worried about emissions and
21 the fact that the DEC was looking at the emissions.

22 Well, Mr. Kamholz knew from back in August
23 of 2007 that there were emission concerns at
24 Tonawanda Coke. There had been an inspection back
25 in August of 2007 by Mr. Sitzman and Miss Webster

1 and Mr. Foersch that dealt with emissions. And
2 there's no evidence whatsoever in the record that
3 Mr. Kamholz did anything untoward after learning
4 about that. And in fact, when this group came back
5 along with Mr. Carlacci on May 28th of 2008, they
6 told him at that time we have continuous
7 monitoring, continuous monitoring going on at
8 Tonawanda Coke.

9 So Mr. Kamholz knew that a year before this
10 April 2009 inspection that DEC was continuously
11 monitoring Tonawanda Coke for its emissions. And
12 is there any evidence he did anything untoward in
13 those next 11 months? No, there isn't. So that
14 has nothing to do with Mr. Kamholz going to look at
15 by-products and talking to Mr. Cahill on what I
16 believe it's been testified was probably that
17 preceding Friday, which would have been April 10th
18 of 2009.

19 And when he went there, he didn't focus on this
20 pressure relief valve. He went there to talk to
21 him about a variety of different concerns that he
22 had, and Mr. Cahill testified about those. He was
23 concerned about the moat and the condition of the
24 moat.

25 And you remember from the testimony of Miss

1 Hamre -- I think you saw pictures -- that moat was
2 not in very good shape. It had objects sitting in
3 it. I think there were pallets sitting in the moat
4 and that type of thing. He told Mr. Cahill to
5 clean it up. If he did, he didn't do a very good
6 job because those items were still there during the
7 inspection.

8 He talked to him about the drip legs, and he
9 said those valves can't be open. Those valves have
10 to be closed, which was the proper way that the
11 valves should be handled. He talked to him about
12 some stray pumps that were lying around in the
13 by-products area. He said clean those up, Pat.

14 And he also talked to him about the AC
15 building, and the condition of the AC building.
16 And during the course of that walk-through that
17 valve went off. And Mr. Kamholz said something
18 about the valve and something about the valve going
19 off during the inspection. What exactly he said we
20 don't know for sure. Mr. Cahill on the witness
21 stand was quite confident as to what he had said.
22 "We can't have that going off while they're here."

23 What he testified to in the grand jury was not
24 the same. He testified four different ways about
25 what was said by Mr. Kamholz during this

1 walk-through. But if we get hung up and we focus
2 too much on what Mr. Kamholz said, and we don't
3 look at what happened after that, we're missing the
4 forest through the trees, because you've got to
5 look at what happens after that.

6 And what do we know from the testimony happened
7 after that regarding Mr. Kamholz and Mr. Cahill?
8 And what's the answer to that question? Zero.
9 Nothing. No further discussion for the rest of
10 history about the pressure relief valve. That's
11 what Mr. Cahill's testimony was.

12 I went through it with him in great detail.
13 First question, after you had that conversation and
14 before the inspection which started the following
15 Tuesday, whenever the meeting was. Cahill says it
16 was Friday. Say it was Friday, Saturday, Sunday,
17 Monday Mr. Kamholz come and talk to you about that
18 valve? No. There was no discussion at all.

19 The inspection starts. Mr. Kamholz come to you
20 and say did you do anything to take care of that
21 valve so it doesn't come up? Nope. Never
22 discussed. Never discussed again. Mr. Cahill
23 says, well, I would raise it up in the morning and
24 I lowered that set point down at night. And did
25 Mr. Kamholz have any idea at all that you did that?

1 No. He doesn't record it in the log book. Does
2 Mr. Kamholz know you didn't record it in the log
3 book? No.

4 Then on that Friday, April the 17th, lo and
5 behold, if it hadn't gone off before then, and it's
6 not clear whether it had or had not, as much as it
7 was supposed to be going off, I don't know. That
8 Friday it goes off and if gets noticed. Any
9 discussion at all with Mr. Kamholz after that?
10 Pat, you didn't do a very good job. Pat, what did
11 you do? Pat, look what you've caused. It is not
12 discussed again.

13 After that you continue, Mr. Cahill, to work at
14 Tonawanda Coke. What was your relationship with
15 Mr. Kamholz? We had a good relationship. Did it
16 change at all after that inspection? Did it change
17 at all after the PRV was discovered? No. No. We
18 continued to have a good relationship. Mr. Cahill,
19 you became the superintendent or the plant manager,
20 whatever it's called, plant -- the head for the
21 whole deal. And from time to time Mr. Kamholz
22 would prepare forms for you to complete. Yeah.
23 Did you have any hesitation to complete those forms
24 based on this prior incident or anything else? No.
25 No. I have no hesitation at all. You relied on

1 Mark and had confidence in him? Yes, I did. Yes,
2 I did.

3 On the day that the valve goes off, which was
4 that Friday April the 17th, what happens? The
5 valve goes off, one of the inspectors -- we don't
6 know who it was -- one of the inspectors notices
7 it, and he says, "What was that"? And
8 Mr. Kamholz's response was either steam or is it
9 steam? And then the inspector -- one of the
10 inspectors said, "What is it?" Mr. Kamholz,
11 immediately without missing a beat said, "It's a
12 pressure relief valve." The next question was,
13 "Well, how long has it been here?" Mr. Kamholz
14 says, "I don't know. Pat, how long has it been
15 here?" And Pat says, "I don't know."

16 You sat through this trial. Does anybody know
17 how long that valve has been there? Was Mr.
18 Kamholz lying when he said he thought it was steam?
19 You remember the testimony of Mr. Cahill when he
20 testified in the grand jury, not here. When he
21 testified in the grand jury, prior sworn statement.
22 You can weigh that in deciding what the truth is.

23 In the grand jury Mr. Cahill testified when
24 that thing went off I didn't know whether it was
25 steam or coke oven gas, that's what he said in the

1 grand jury. Here he said he was shocked because
2 Mr. Kamholz thought it might be steam. It's not
3 what he said in the grand jury. Why the change? I
4 don't know. But that was his grand jury testimony.

5 Could you put up Government Exhibit 50, Lauren?
6 I hope that's right.

7 This is the picture that shows something coming
8 out of that pressure relief valve. Mr. Cahill was
9 asked about that during his trial testimony. And
10 he was asked -- I think it was by Mr. Mango --
11 "What is that coming out of that -- out of that
12 valve?" His answer, "I don't know." He didn't say
13 it was coke oven gas. Even in the picture,
14 Government Exhibit 50, which shows something coming
15 out of the valve, Mr. Cahill's trial testimony was
16 "I don't know", and it was truthful, because you
17 don't know. It didn't always emit coke oven gas.
18 It had a steam line on it and sometimes it emitted
19 steam.

20 So for Mr. Kamholz in response to the question
21 "What was that?" to say, "Steam" or "Is it steam?"
22 was an entirely, entirely truthful response. His
23 immediate response when asked, "What is it?" to
24 say, "It's the pressure relief valve" was an
25 entirely truthful response. His response to the

1 question, "How long has it been here?" To say, "I
2 don't know," Pat, you're the foreman for
3 by-products. You've been here for 15 straight
4 years -- he didn't say that, but as you know, Pat,
5 I only come here once every month or three months.
6 How long has it been here, Pat? Was there
7 something wrong with him asking Cahill to give his
8 response on that, and then what happened?

9 Mr. Cahill took a couple of the inspectors to
10 the little green shack where this set recorder is,
11 and provided them with truthful information on how
12 the shack operates. There's no suggestion that
13 anything Mr. Cahill said was wrong or inaccurate.
14 There is no suggestion Mr. Kamholz exercised any
15 control over what Mr. Cahill said.

16 Then the following Monday, which would be April
17 the 20th, and the following Tuesday, which would be
18 April the 21st, there were additional questions
19 asked of Mr. Kamholz and Mr. Cahill regarding the
20 pressure relief valve. Truthful responses were
21 provided to those questions. There is no
22 suggestion Mark Kamholz exercised any improper
23 control over the information provided by Mr. Cahill
24 or that the information provided by Mr. Kamholz was
25 anything other than truthful.

1 So where is the obstruction? If you look at
2 entire context of this circumstance, where is
3 the -- where is the wrongdoing? What was done here
4 that was that was wrong? So then the question is,
5 well, why would you refer questions about
6 by-products to Mr. Cahill? Why wouldn't you answer
7 those yourself? Why wouldn't you refer questions
8 about by-products to Mr. Cahill? He's the one that
9 works there. He's the one that's in day in and day
10 out. He's the one that's been there for 15 years.

11 Other questions regarding by-products were
12 referred to Mr. Cahill during the inspection. Was
13 there something wrong with that? If you remember
14 the evidence, Mr. Cahill remembered that he was
15 asked about the moat, the tar precipitator pump,
16 the light oil system, the drip legs, and the
17 ammonia stripper among other questions that he
18 answered during the inspection.

19 It was in Martha Hamre's log, this daily log
20 that she kept, about her references to ask Pat, or
21 talked to -- to the foreman of by-products. So,
22 having him answer questions about the PRV, there
23 was nothing wronging with that. Mr. Cahill
24 testified he wasn't happy about that. He felt as
25 though he had been put on the spot, and just to

1 bring this back, the Batman objection by Mr. Mango,
2 and we got a laugh out of that, but the question
3 had been asked was with great power comes great
4 responsibility. And the point of me asking that
5 was not to -- not to get a laugh out of the jury,
6 but the point is -- the point is this, if you're
7 going to be the foreman of a department, if you're
8 going to take the extra money you get to be the
9 foreman, if you're going to enjoy the extra
10 benefits when you are the boss of a department,
11 you're going to get upset during an important
12 inspection when you're asked to answer questions
13 about how that department operates? It just
14 doesn't make sense, and it certainly isn't fair to
15 put some responsibility on Mr. Kamholz because
16 Mr. Cahill didn't like being put on the spot.

17 And what do we know about Mr. Cahill? What we
18 know about him is that, as I told you, Tonawanda
19 Coke is a community just like any other community,
20 just like you are a community. And we all react
21 differently to different situations.

22 There was a time many years ago when I started
23 doing this where I hated doing what I'm doing right
24 now, standing up like this, I was sweating bullets
25 and my knees were knocking. I wasn't comfortable

1 doing it at all. I've been doing it a long time.
2 It's okay. I don't mind doing it. We all have
3 things we like to do and we don't like to do. And
4 Mr. Cahill said he doesn't like to be the center of
5 attention. That's okay. That's understandable.
6 He said that. He doesn't like being put on the
7 spot. You could tell I think when he was on the
8 witness stand, he wasn't comfortable. Remember
9 when he was asked to look for some circular charts
10 and Martha Hamre noticed he was nervous? That's
11 his personality.

12 But to infer from that because he didn't like
13 being asked questions about his department, that
14 that means this man is a criminal or engaged in
15 obstructive behavior, it just doesn't follow. And
16 there is a couple upside down perversions about
17 this whole thing that I don't know what weight they
18 should carry in your deliberations. But it's
19 turning the world on its ear, which is a lot of
20 that in this case.

21 But what is the principle complaint about what
22 happened? The allegation is I guess that
23 Mr. Kamholz said whatever he said on April the
24 10th, and that caused Mr. Cahill to raise the set
25 point on the PRV. After the EPA and the DEC find

1 out about the PRV, what do they tell Mr. Cahill and
2 Mr. Kamholz to do? Turn up the set point on the
3 PRV.

4 And what else seems unusual about this and
5 doesn't really make a lot of sense, what's the
6 other complaint? The other complaint is apparently
7 that it was -- it was significant that Mr. Cahill
8 when he would do what he did, on his own, wouldn't
9 record it in this by-product operators log book.
10 That he was doing what he did, and he claimed the
11 reason was because he didn't want anybody to know
12 what he was doing.

13 Well, we know from the evidence both from his
14 testimony and from these by-product operator log
15 books and the testimony of Mr. Conway, Mr. Cahill
16 never ever put any of his change in the set point
17 entries in the log book. There are none. So, is
18 there a reasonable doubt? Is there more than a
19 reasonable doubt? Would you hesitate to act on
20 this evidence in a matter of importance? I don't
21 think there's any question but that you would.

22 Now, the government, and they're certainly
23 entitled to do this, but what they do is they try
24 to -- to dirty up Mark Kamholz. This obstruction
25 allegation, I can tell from how you reacted to when

1 this evidence comes in, I can tell how you reacted
2 when Mr. Linsin closed yesterday and said, "I'm
3 going to have Mr. Personius talk about that", that
4 you were looking to me because you wanted to hear
5 about this. I understand this is important to you,
6 and it well should be. It's also important to Mark
7 Kamholz, and it's important to his family how this
8 case gets decided. And the government, quite
9 rightly, says if we can throw some dirt on Kamholz,
10 it's going to help. You know, we got to try to do
11 that, so that's what they tried to do in this case.

12 He's been referred to as being manipulative and
13 deceitful. That's how he's been described by the
14 government. Again, lets put this in context.
15 We're going to part two of my four-part
16 presentation. So you're through the first quarter.

17 Remember what you've heard from the evidence,
18 the government went to Tonawanda Coke on
19 December 17th, 2009. And Mr. O'Connor, who
20 testified -- he's in the front row there -- he was
21 there. They took a bunch of the agents out there.
22 They conducted what's called a federal raid. The
23 whole point of doing that is to catch the target
24 off guard, to get the smoking-gun evidence that
25 shows the criminality. They're a lot of work. So

1 the reason you do that, rather than issue a
2 subpoena is -- it's like a Pearl Harbor surprise
3 attack type move. Get it before they could get rid
4 of it or change it.

5 They were there for 12 hours. That's a long
6 time. There were a lot of agents there. They
7 seized 36 large boxes of documents. Thirty-six
8 boxes of documents. And what do we have in this
9 case is the evidence that they got out of that
10 seizure. What's been offered in evidence here
11 that's the smoking gun evidence, the evidence that
12 Mark Kamholz is a monster? Some of his handwritten
13 notes from the inspection where he says something
14 about got Pat Cahill on April 20th to talk about
15 the PRV. That's bad? You got the foreman of
16 by-products to talk to the inspectors about the
17 PRV. That's incriminating?

18 The draft of his response to the request for
19 information letter that Mr. Kamholz submitted to
20 the EAP in October of 2009, there's something wrong
21 with that draft? There is a crossed-out word in
22 there. Mr. Mango has invited you to speculate on
23 what that crossed out word is. I mean, where are
24 we going with this case? Where's the smoking gun
25 that came out of the 12 hours and the 36 boxes of

1 evidence that was seized? So keep that in mind.

2 The criminal investigation then went on for
3 about ten months. We know it started in October
4 of 2009. We know the indictment was returned in
5 July of 2009, so that's about ten months. And we
6 know that during that period of time Mr. Conway was
7 working on it, Mr. O'Connor was working on it, and
8 a whole bunch of other agents and investigators
9 were working on it too. We know they had the
10 benefit of the grand jury. We know witnesses
11 testified in the grand jury. It's a big deal.
12 It's a lot of power. You can subpoena somebody.
13 You can force them to come in, you can put them
14 under oath in front of a grand jury and ask them
15 all the questions you want about the case. And the
16 government, we know from the evidence, we know they
17 took full advantage of that. They had an unbridled
18 opportunity, unbridled opportunity to get all the
19 evidence they wanted on Tonawanda Coke and on Mark
20 Kamholz.

21 They put Mr. Kamholz and his conduct under a
22 30-year microscope over that ten-month period. And
23 what do we have that shows that he's this deceitful
24 person, this monster that Mr. Kamholz [sic] has
25 characterized him as being? I want to, if I can,

1 I'm going to go through that with you in a minute.

2 What we know from the trial evidence is that
3 there's a gentleman that worked in by-products back
4 in the '90s. His name is Keith Hutchinson. You
5 can look up there and see him. I don't think
6 you'll remember him. He was pretty quick, but what
7 he said about Mark Kamholz was not insignificant.
8 And the only reason we were able to get this out is
9 he happened to say it to the investigator, so we
10 knew about it.

11 He described Mark Kamholz as being a straight
12 shooter. He described Mark Kamholz as being very
13 strict on environmental compliance. That's what
14 Mr. Hutchinson said about Mark. Now getting into
15 this a little later.

16 Contrast that, if you will, with -- remember
17 Mr. Carlacci? He was the first witness. He was up
18 here for three days when we thought this was going
19 to be a six-month trial. It took us three days to
20 get through the first witness. We speeded it up
21 after that fortunately for all of us.

22 Mr. Carlacci, if you recall, at the tail end of
23 his direct testimony -- he was put on as an expert.
24 But by the end of it he was an advocate. He was an
25 advocate to paint Mark Kamholz as a bad person.

1 Remember he talked about the May 28, 2008,
2 inspection, and he accused Mr. Kamholz of having a
3 mask. And he put the mask on over his face when he
4 walked through by-products. And he accused
5 Mr. Kamholz of being uncooperative, uncooperative
6 during that visit.

7 Well, we were able to put into evidence his
8 notes. What was it, three lines at the top, three
9 lines at the bottom, notes that he had from what he
10 described at that visit. And nothing in there,
11 nothing in there about any of this. And there are
12 other people that were present for that visit too,
13 Cheryl Webster, Larry Sitzman, and Mr. Foersch was
14 there too. Nothing, nothing about any improper
15 behavior at this visit from Mr. Foersch. In fact,
16 he said, no, I didn't notice anything at all. I
17 didn't notice anything at all -- anything different
18 about Mark during that visit. No, it was typical
19 Mark.

20 And then as far as the mask was concerned,
21 Mr. Foersch, said, Mark -- that wasn't uncommon for
22 Mark to have a mask around his neck. When you go
23 to the battery, you have to wear a mask. It
24 doesn't matter who you are. If you're Mark Kamholz
25 or you're Donald Crane or you're Mr. Saffrin, you

1 wear a mask in the battery area, not for gas
2 emissions, but for particulate emissions. And
3 that's what Mr. Foersch said.

4 So, for the first of these instances of
5 misconduct that we have, that's -- that's what you
6 have in the evidence. You have Mr. Carlacci, the
7 expert, being the advocate, not supported by his
8 notes versus the other evidence in the case, which
9 demonstrates that what Mr. Carlacci was saying did
10 happen did not happen. Mark was not uncooperative
11 during that inspection. And as Mr. Carlacci
12 suggested, he wanted him -- if you remember, he
13 wanted him to be the plant manager. We had to
14 correct that on cross and say he's not the plant
15 manager. He's the environmental compliance officer
16 for the company. And the mask, I think it's clear,
17 Mark would have a mask around his neck because of
18 the battery, and it had nothing to do with the
19 by-products area. That's one of these 12 instances
20 where Mark has been painted as a bad person.

21 A lot has been said about the letter that was
22 sent to Mr. Kamholz in September of 2009 by
23 Mr. Patel. Remember that when they had the
24 inspection in April, you had Miss Hamre and another
25 gentlemen from Denver, the NEIC. You had from

1 Region 2 in New York City Mr. Patel and two other
2 gentlemen, and you had some folks there from the
3 DEC. And Mr. Patel testified that the EPA decided
4 after the inspection they would send a couple of
5 these request letters. They're called 114 letters
6 asking for information to -- to Mr. Kamholz. They
7 sent one in July and they sent this other one in
8 September. And the one that's really been the
9 focal point in terms of Mark being a bad person was
10 the one that was sent in September.

11 Again, you have to put in perspective what
12 Mr. Patel knew and what Mark knew when that letter
13 was sent and when the response was received. And
14 what do we know about Mr. Patel? He was present
15 for the first week, but because of funding, he was
16 not present for the second week. He left on that
17 Friday, along with the other two gentlemen who came
18 with him and went back to New York City. When was
19 the information provided about the pressure relief
20 valve? The next Monday and Tuesday, the 20th and
21 21st, when Mr. Patel and the other two, who wrote
22 this letter from Region 2 when they weren't there.
23 They were gone.

24 And -- pardon me -- what was talked about
25 during -- on the 20th and 291st? There was talk on

1 both dates about the pressure relief valve and how
2 it worked and all the details of it, and so on, and
3 so forth. So, when Mr. Kamholz gets the letter in
4 September, he's got it in his head that DEC and EPA
5 know about the history of the pressure relief valve
6 because it's been discussed. Mr. Patel and the
7 other two gentlemen with him who wrote the letter,
8 they don't know that, because they weren't there.

9 So the letter gets written to Mr. Kamholz. And
10 one of the questions -- and I think the only one
11 that we really have to focus on is question 20F,
12 but before we get to that, remember also that on
13 his direct examination what Mr. Patel suggested to
14 you was that the whole letter as is related to the
15 PRV was misleading because he was seeking five
16 years of information.

17 And when I asked him on cross, your testimony
18 was you expected to get five years of historical
19 information on the PRV, what did you base that on?
20 And if you recall -- if I recall his testimony he
21 said, well, it's in the instructions. So we went
22 to the instruction sheet and he looked through it
23 and he looked up and he said it's not there. And
24 it wasn't there. And what you have to do with that
25 letter -- I don't think I'm going to take the time

1 to put it up. But I encourage you, if this is a
2 matter of concern to you, I encourage each of you
3 to go look at that letter. It's Government
4 Exhibit 126. The way the letter is set out is if
5 Mr. Patel wanted information going back five years,
6 he asked for it. And there's a specific example.
7 There's two examples where he asked for
8 five-year-old information. He would say I want
9 information going back five years. He didn't say
10 that with the pressure relief valve.

11 Where he does say it is there's a question
12 about benzene service, and it's question number 16,
13 and you're not going to remember this, but you're
14 hopefully going to remember that Personius told me
15 this, 16, Sweet 16, look at number 16, that's where
16 Mr. Patel specifically asked for information going
17 back five years.

18 If you look at the questions related to the
19 pressure relief valve, which are questions at 20,
20 and 20F comes the closest, but if you look at those
21 questions, they don't go back five years, and
22 Mr. Kamholz at the time he fills this out, he has
23 in his head I've already told them back on
24 April 20, 21st about the PRV. They're looking for
25 what the current information is, not the historical

1 information.

2 Question 20F is the difficult one, because if
3 you look at the question, it's split. It asks for
4 current information and old records depending on
5 what the answer is. But in terms of the
6 information request, it's current. You only
7 provide records if the current information requires
8 you to look back the five years.

9 In addition to that, we know from the evidence
10 that Mr. Kamholz included a cover letter, and I
11 asked Mr. Patel about that. Did you read the cover
12 letter? Yes, I did. What did the cover letter
13 say? If you have any questions at all about my
14 responses, call me. So I asked Mr. Patel, did you
15 pick up the phone and call Mr. Kamholz if you were
16 unsatisfied or dissatisfied with what he said about
17 anything including the PRV? And his answer was no.
18 I don't know even -- I guess I must have asked him
19 this, why not? And he said because I talked to my
20 supervisor, and he said I can't call him. And the
21 reason he couldn't call him was because the
22 criminal investigation was pending. I mean, is
23 that fair? I mean, you answer questions in good
24 faith. The person who writes the question from the
25 EPA wants to ask a question about it, and he's told

1 by his supervisor, no, you can't call him because
2 there is a criminal investigation pending. Is that
3 fair? Does that make him a deceitful person? Look
4 at the letter if it's of concern to you.

5 You can kind of get a sense when you're sitting
6 over there when things resonated. Cahill resonated
7 with you, and when Patel testified about this I
8 think it resonated with you. We'll meet it head
9 on, and I'll look every one of you in the eye and
10 neither one of these is a concern. You'll have to
11 remember the Cahill testimony and take into
12 consideration everything that I've told you about
13 the circumstances, and you'll make that decision.
14 On the letter, you can go look at it. And I invite
15 you to do that, because it's very clear when
16 Mr. Patel wanted old information and when he did
17 not.

18 Miss Hamre, something else that came up
19 yesterday in Mr. Mango's closing. This is number
20 three, three out of 12. We're getting there. She
21 testified that oh, by the way, during the opening
22 day of the inspection on April the 14th, that
23 Tuesday, Mr. Kamholz said there was no pressure
24 relief valve anywhere in the facility. Wow. But
25 on cross-examination by Mr. Linsin it became clear

1 that if you looked at her notes in context that
2 what she was talking about was the battery flare
3 when she wrote that note. It didn't have to do
4 with the whole facility, much less with the
5 by-products area.

6 And would Mr. Kamholz say that anyway when he
7 made prior disclosure to the DEC that talked about
8 pressure relief valves? This isn't the only
9 pressure relief valve at Tonawanda Coke. There is
10 a number of pressure relief valves there. And this
11 is probably the most important point on the fact
12 that she is mistaken in her recall. There were
13 other people present for that initial session.
14 There were people present who testified here in the
15 court that were present. I think Mr. Sitzman was
16 there. I think Mr. Patel was there. And do you
17 think that if they understood that Mr. Kamholz had
18 made that representation, that the government
19 wouldn't have asked them about that during their
20 testimony? Do you think if others who were present
21 who weren't called remember or understood that
22 that's what Mr. Kamholz had said that they wouldn't
23 have been called as witnesses here? Of course,
24 they would have.

25 And the fact of the matter is it didn't happen.

1 And do you think that if it was understood that
2 Mr. Kamholz on April 14th had said there's no
3 pressure relief valve on the coke oven gas line,
4 which is what she suggested by her testimony and
5 what the government argued in their closing, do you
6 think for a minute that when that valve got
7 discovered that that wouldn't have been brought up,
8 that that wouldn't have been in somebody's notes
9 again, that that wouldn't have been a topic of
10 discussion? He said that on a Tuesday, and they
11 find out on a Friday, and nobody talks about it?
12 It just doesn't comport with what the Judge told
13 you to use which is your common sense and your
14 intelligence and your experience. Things don't
15 happen that way. So her testimony on that she was
16 mistaken.

17 Mr. Foersch testified, not on my examination
18 but on Mr. Piaggione's cross-examination, that
19 after he -- the last time he looked in quench tower
20 number 2 and saw that either there were no baffles
21 or that it was in disrepair, that he never went
22 back there. There's no question about that. But
23 he claimed in response to a question by
24 Mr. Piaggione that a year later he asked Mark
25 Kamholz, "Did you put those baffles in quench tower

1 number 2"? And he testified under oath that
2 Mr. Kamholz said, "Oh, yeah, I put them in there."
3 And I suggest to you that that conversation did not
4 happen. And this would be the fourth badge of
5 fraud, if you will, that the government relies
6 upon.

7 If you'll remember Mr. Foersch had been
8 interviewed right after Mark was arrested. Mark
9 was arrested on December 23rd of 2009, two days
10 before Christmas.

11 MR. MANGO: Your Honor, I have to object
12 to that. There's no evidence in the record about
13 an arrest on a specific date.

14 THE COURT: Okay. The jury heard the
15 evidence, and we'll leave it go at that.

16 MR. PERSONIUS: In early January of 2010,
17 if you recall from the evidence, we sent a private
18 investigator, a retired FBI agent to go talk to
19 Mr. Foersch. Talked to him twice. Those two
20 interviews were separated by ten days. During the
21 intervening ten days Mr. Foersch had the
22 opportunity to talk with a DEC attorney.

23 During the first interview Mr. Foersch
24 indicated to Mr. Thurston that he was fully aware
25 that there were not baffles in either quench tower.

1 Mr. Foersch made no mention of Mr. Kamholz ever
2 telling him that he had put baffles in quench tower
3 number 2.

4 Mr. Thurston came back. He gave Mr. Foersch --
5 the second time he came back after Mr. Foersch had
6 talked to this DEC attorney, and he said, I want
7 you to review my report, and I want you to make any
8 changes to the report that you'd like to.

9 Mr. Foersch read it. The only change he made was
10 to say, well, I want you to take out the word
11 "fully" in front of the "aware", and the word
12 "aware" was in front of "aware there was no baffles
13 in both quench towers", so Mr. Thurston crossed out
14 the word "fully". It was the only change he asked
15 to be made to the report. He didn't say anything
16 at that interview about Mr. Kamholz having told him
17 he put baffles in quench tower number 2.

18 Mr. Foersch then testified in the grand jury
19 during 2010. I can't remember if it was March or
20 July, sometime in 2010, a little later in the year.
21 And he was extensively questioned by the government
22 about his interaction with Mr. Kamholz and these
23 baffles. And Mr. Foersch testified about looking
24 at the tower and seeing that it was -- in the grand
25 jury said it was in disrepair. This was the last

1 time he looked.

2 And he was asked in the grand jury -- you
3 remember he was impeached on this. Impeached means
4 you read somebody's prior statement and try to
5 demonstrate that it's inconsistent with what he's
6 testifying to at trial, which, by the way, is a
7 very important piece of evidence, as the Judge has
8 told you, to weigh in assessing the credibility of
9 a witness.

10 Back in the grand jury when Mr. Foersch
11 testified about looking in this tower and it was in
12 disrepair. He was asked did you do any follow up?
13 And his answer was no. A few questions later he
14 was asked did you ever talk to Mr. Kamholz again
15 about it? Specific question, perfect opportunity
16 to say yeah, a year later, a year later I went back
17 and asked him, and he told me they weren't there.
18 He said I don't recall talking to Mr. Kamholz.

19 Somehow between 2010 and the time he sits in a
20 public courtroom Mr. Foersch's memory changes. And
21 I don't mean to criticize him for what he did. He
22 was put in a very, very bad spot. He's the one who
23 was this 30-year face of the DEC. He's in a bad
24 spot. He's sitting in a courtroom, not as many
25 people as there are here now, but he was put in a

1 bad spot. But if you recall his testimony, he was
2 pretty much at ease when he started. And as we got
3 closer and closer, as the years passed and we got
4 to those letters from December of '96 and January
5 of '97, if you recall, his comfort level in the
6 witness box changed, and he became less and less
7 comfortable. And it's understandable that he would
8 because he's in a bad way.

9 But what I suggest to you is that his recall
10 that he testified to here that the government wants
11 you to rely on as good evidence, that you wouldn't
12 hesitate to act upon is not good evidence. And
13 he's misremembering what happened, and he's doing
14 it because he was put in a bad spot, and he was
15 embarrassed. You recall, I came back on at that
16 point, redirect or whatever it was, and I asked
17 him, and I said in your heart of hearts isn't it
18 true you knew there were no baffles in there? And
19 he had that pained look on his face. He became
20 very uncomfortable, and I hated to do it to him,
21 but he said yeah, yeah, I knew they weren't there.

22 And on the last point on this, do you think for
23 a minute if the government really believes that
24 that happened, do you think for a minute if they
25 had a witness who had directly lied to a DEC

1 officer and said he put baffles in there when he
2 didn't, do you think for a minute that they
3 wouldn't have called him as their witness? Of
4 course, they would have. But they didn't. We had
5 to call him. So my point is that didn't happen.

6 It was suggested in opening and it was carried
7 forth in the government's closing that there was an
8 effort, and apparently the claim involves
9 Mr. Kamholz, this is number five, to delay these
10 inspectors when they came to Tonawanda Coke. And
11 this was part of this scheme of deception. There
12 is the guard house, and they would have to wait
13 there before they could come into the plant. And
14 Mr. Kamholz or somebody else would come out and
15 greet the inspectors.

16 Mr. Kibler, who is the gentleman who was
17 involved in those 303 -- the daily 303 inspections,
18 the oven batteries, he was asked about that. He
19 said, no, no, that didn't happen. There's no
20 delay. No, I came in, I went over, I changed, and
21 I went out, and I did my inspection.

22 There was an attempt with the volunteer fireman
23 yesterday, two days ago -- I'm losing track of my
24 days -- two days ago, the volunteer fireman,
25 Mr. Ianello, there was an attempt to suggest with

1 him that when he came to the facility looking for
2 the fire and the guard didn't immediately let him
3 drive through, that that somehow was a
4 manifestation of this same type of improper
5 conduct.

6 Sometimes you take reality and you stretch it
7 too far, hesitate to act in the most important of
8 your own affairs. But more to the point, during
9 the cross-examination of Mr. Foersch, Mr. Piaggione
10 asked him, well -- because he could because it was
11 cross -- isn't it true that every time you came out
12 there Mr. Kamholz knew exactly what you were going
13 to do? And my recall of Mr. Foersch's response,
14 no, that's not true. He had no idea what I was
15 going to do when I came out there. There is no
16 evidence in the record that supports that
17 allegation by the government that they continue to
18 argue in their closing.

19 Number six, reference was made to a conference
20 that Mr. Heukrath testified about, and he was one
21 of the later witnesses in the case. You'll
22 remember Mr. Heukrath, he gave the longest
23 description of his employment history in the
24 history of mankind. He went on for a couple of
25 pages of the transcript describing his past

1 history. He's an earnest man, and he's very
2 precise, and certainly came across as a credible
3 witness.

4 But, in any event, he testified about
5 conversation he had with Mr. Kamholz in the fall
6 of 2009. And it had to do with benzene emissions,
7 and he recalled that Mr. Kamholz responded, well,
8 there's no restriction on the amount of benzene
9 emissions, and that's how it was left on direct,
10 that's how it was left during the government's
11 closing.

12 On cross-examination I went up and I said, do
13 you remember what the context -- do you remember
14 what the context of the conversation was, and
15 Mr. Heukrath fortunately did. And he said, yeah, I
16 remember I was talking to him about quench towers
17 in the AC building. He wasn't talking about waste
18 heat stacks or pressure relief valves or anything
19 else. But you need to know that to be able to put
20 that comment in meaning, or is it better to just
21 say that Mr. Kamholz said to Mr. Heukrath that
22 there's no restrictions on benzene emissions?

23 Well, again, you got to know the context. You
24 got to look at the circumstances when the comment
25 was made and what the conversation was that took

1 place at that time.

2 Number seven, and this was mentioned again in
3 closing, that back in the '90s both Mr. Brossack
4 and Mr. Priamo -- Anthony Brossack worked in the
5 battery area. He was like the third witness. And
6 Mr. Priamo was the gentleman with the nice
7 mustache. But in any event, they both remembered
8 that back in the '90s they talked to Mr. Kamholz on
9 an occasion when the pressure relief valve released
10 and asked him if it was okay, and he said it was.
11 And that makes him deceitful or manipulative? Or
12 is that simply Mr. Kamholz's expressing his good
13 faith belief that as far as he knew it was okay,
14 that the way the valve was being used that that's
15 okay? Is that some indication he's a bad person?

16 Number eight, and again it came up in closing,
17 and this ran through the trial and I'm not sure
18 where it goes or what it means. But Mr. Brossack
19 remembered that back in the '90s Mr. Kamholz on one
20 occasion after something had happened, Mr. Brossack
21 was on the radio and referred to a quench tower --
22 or quench station as a quench tower, and that this
23 difference between a tower and a station was
24 somehow important and somehow shows that he's less
25 than honest.

1 And witness after witness was asked, and they
2 said it doesn't -- it has no meaning. It doesn't
3 matter. It doesn't mean anything. But to the
4 government it apparently means something. And
5 beyond that, not that it matters, but Mr. Patel
6 remembered that -- the gentleman from New York
7 City -- he remembered that there was a MACT, they
8 call it a MACT standard -- that specifically talked
9 about the difference -- if it matters between a
10 tower and a station. I don't think it does matter,
11 but the government chooses to continue to bring it
12 up. It doesn't mean Mark Kamholz can't be trusted
13 or that he was stacking the deck against the DEC.

14 This was mentioned once, and it hasn't come up,
15 but I'm telling you everything I could figure out
16 that was an attempt to try to tar Mark Kamholz's
17 image. You've heard a lot about the emission study
18 from July of 2003, and it's mostly about the -- the
19 table in it that has the information about the PRV
20 on the coke oven gas line. You've heard a lot
21 about that.

22 Well, there's another page in that exhibit,
23 again it's Government Exhibit 131, and at page 2-10
24 there is a discussion of the quenching system at
25 Tonawanda Coke. And what it says in there is that

1 there is a single quench tower at Tonawanda Coke
2 and it has baffles. And if you recall, this is why
3 it stands out in my mind, when that was read Judge
4 Skretny stopped and said, did you say quench tower
5 as opposed to towers? And the witness or the
6 person questioning, somebody said yes. And the
7 point is that's wrong. It's incorrect.

8 And what I want to suggest to you is so what?
9 Mr. Kamholz didn't write it. He submitted it, but
10 he didn't write that. The fact that it refers to a
11 tower is an indication that the author did not have
12 good information on what that meant, but beyond
13 that, remember what that study was. And this helps
14 explain why Mr. Kamholz would have missed it. If
15 and when, you got to assume he looked at it, but
16 why he would have missed it.

17 This study had to do with -- some of you know
18 more about this than I do -- HAPS emissions. And
19 it had to do with leaks. What relevance would what
20 was going on in the quench tower have to do with
21 that anyway? And I only mention that because it
22 helps explain why Mr. Kamholz would have missed
23 that. I don't know if it's going to come up on
24 rebuttal. Again, it's there. I want to try to
25 identify everything I can for you and explain to

1 you why what the government is trying to do here,
2 it just doesn't wash. And the other point about it
3 is that reference is completely immaterial to the
4 purpose -- to the purpose of the study.

5 There was a lot made of the annual and
6 semi-annual certifications that would be prepared
7 by Mr. Kamholz, and starts at Government
8 Exhibit 31, prepared by Mr. Kamholz, and then
9 signed by the plant manager. And we had a couple
10 witnesses talk about how they didn't like having to
11 sign those.

12 And again, if that concerns you, if you take a
13 look at the forms, what you'll see is they are
14 clearly set up so that a person who knows about
15 what's being reported fills it out and signs it.
16 And Mark Kamholz signed every one of those and
17 somebody who is a responsible party, i.e. the plant
18 manager, is expected to also sign them. There's
19 nothing improper or sinister about those forms or
20 the fact that they're signed by both Mr. Kamholz
21 and the plant manager.

22 Something that hasn't been mentioned since it
23 was brought out, but it came out in Mr. Brossack's
24 testimony is you've heard about what's called the
25 beehive. The beehive is when the exhauster shuts

1 down. When the exhauster shuts down, you're not
2 sucking the gas out of the battery. The exhauster
3 pulls the gas towards the exhauster, and when it
4 goes to the other side, it pushes it away. So it's
5 like a vacuum cleaner sucking it up and pushing it
6 out the other side. If the exhauster dies, there's
7 nothing that pulls that coke oven gas out of the
8 battery.

9 So, what you have to do at that point is that's
10 when you have to light this flare. It's a rare
11 occurrence. It doesn't happen often at all. But
12 the government asked Mr. Brossack about beehiving,
13 and Mr. Brossack recalled a conversation that he
14 had with Mr. Kamholz where Mr. Brossack had had an
15 experience where the exhauster was shut down for
16 about 45 minutes, and Mr. Kamholz made some
17 comment. It wasn't clear what he said, but
18 something about ten minutes, that beehives don't
19 last more than ten minutes. It's not clear what he
20 said.

21 I'm not sure why it was brought up, but what
22 came out of all of that was it lasts -- if there is
23 a beehive, what do you do with it? We put it in
24 the general foreman's report. What happens with
25 the general foreman's report? Do the inspectors

1 look at that? And the answer was no. So, I don't
2 know what the purpose -- maybe we'll find out on
3 rebuttal why that's important. But I don't know
4 what the point is. I don't know why it was brought
5 up, and I don't know what it means.

6 And again, Mr. Brossack and Mr. Priamo each
7 have been there over 30 years. Each of them said
8 that there's been less than 30 -- less than 15 of
9 these incidents, so it happens about once every two
10 years. It's a very, very rare event that the
11 beehive occurs. That's 11.

12 Now, number 12. And on this one, government,
13 you got Mr. Kamholz. The battery flare. He
14 shouldn't have let that happen. We admit that. We
15 fess up to that one. That battery flare should
16 have had the -- the automatic igniter, the pilot to
17 do it. It should have and it didn't. It started
18 in '94, lasted until 2008, about 14, 15 years.
19 Granted that ties in with these beehives. So
20 during that period of time it would have been used
21 about seven or eight times, but it should have the
22 pilot hooked up to it, and it didn't.

23 And it was suggested in the government's
24 closing that that was Mr. Kamholz's decision to
25 shut the natural gas off. My recall is I

1 specifically asked Mr. Brossack -- the way I said
2 it was you don't mean to suggest to this jury that
3 it was Mr. Kamholz's decision to turn off the
4 natural gas, and he said oh, no, no. No, I don't
5 mean to suggest that. Mr. Kamholz was the
6 messenger. He's the one that said it's shut off
7 because natural gas was expensive. The government
8 recalled the testimony differently, and I think
9 they're incorrect, because I remember asking the
10 question. It wasn't Mark Kamholz's decision. But
11 should he have not allowed that to happen?
12 Absolutely.

13 And in the letter, this letter that came out in
14 September of 2009. It gets answered by him in
15 October of 2009 from Mr. Patel, that has a question
16 in it that asked about the -- about this flare.
17 And that's the other example where there is a
18 question that asks for information and documents
19 going back five years. And that's question number
20 33, and it's in Exhibit 126. And the way
21 Mr. Kamholz answers that question is -- he doesn't
22 lie, but he simply says there are no documents. He
23 just doesn't answer the question about whether or
24 not it hadn't operated in the past five years, and
25 he should have.

1 So, one instance. Thirty years, 12-hour
2 search, ten-month investigation, full power of the
3 grand jury, complete federal investigation, and one
4 instance where Mr. Kamholz is subject to criticism.

5 We're going talk about the entrapment by
6 estoppel now. It's very, very important to us that
7 you give consideration to this defense in this
8 case, and it explains why we took the time we did
9 with these different DEC witnesses to talk about
10 what their relationship was with Mr. Kamholz and
11 with Tonawanda Coke. And what I suggest to you
12 that we drew out of that evidence is that, number
13 one, the relationship that Tonawanda Coke had from
14 1980 or so, however far you want to go back,
15 until 2009, until April of 2009, it was with the
16 DEC. It wasn't with the EPA. EPA had come out
17 there twice to do inspections, and Mr. Foersch
18 couldn't remember anything about them. One around
19 1990, another around 2000. That's the only time
20 they had been there.

21 Then, as the way Mr. Linsin described it,
22 there's a new sheriff in town. They come in in
23 April of 2009, they do this inspection, and then
24 there's a tsunami change in what the regulatory
25 attitude is. And it's our position that that just

1 isn't fair. It isn't fair to prosecute a company
2 or an individual for what they've been doing for 30
3 years that they thought was okay because another
4 agency, the feds, decide to come in and read the
5 rules differently.

6 And provided the elements are met, and we
7 embrace those elements that have to be met,
8 provided those are met, you have the authority, the
9 power -- what is it, where there's great power,
10 there's great responsibility. You have the power
11 to decide this case based on that defense. We have
12 the burden -- it's not beyond a reasonable doubt,
13 but we have to show that it's more likely than not
14 that this circumstance prevailed.

15 One of the reasons we called Gary Foersch as a
16 witness when the government didn't was because it
17 was a great way to try to describe to you what that
18 relationship was between Mr. Kamholz, Tonawanda
19 Coke, and the DEC. And I suggest to you that what
20 you found from his testimony is that it was a good,
21 positive, productive relationship, that they got
22 the work done, that Mr. Kamholz wasn't in his
23 pocket, that there was no fix. It was outgoing,
24 honest relationship over those 30 years.

25 Not everything was documented. Some of

1 Mr. Foersch's reports leave something to be
2 desired, but the work was done. The focus was put
3 where it should be. It was put on the battery,
4 because that's where the problems are, and things
5 were taken care of. If there was a question or a
6 concern, you call, and it would get taken care of.

7 Remember Mr. Sitzman testified, yeah, I
8 remember that. He remembered a time that he wanted
9 to come out, there is some complaint about these
10 emissions. He said I want to go out and I wanted
11 to check the emissions in the battery. He called
12 Mark, and Mark said, yeah, come on out. So he came
13 out at eleven at night. Was Mark there? Yes, he
14 was. And until two in the morning he checked the
15 emissions. And Mark was there with him. Stayed
16 the whole time.

17 He mentioned another example where the
18 Tonawanda Coke, on its own, because there was some
19 complaint about these emissions it raised its waste
20 heat stack by 30 or 40 feet to try to help address
21 that issue. That's the kind of relationship that
22 it was. They weren't going to get hung up on
23 formalities. They were going to get the job done
24 and the job did get done.

25 Now, I want to take that, and I want to apply

1 step-by-step with you how we think this entrapment
2 by estoppel defense applies to one of the set of
3 the charges. I'm not going to go through all of
4 them, because we will be here two or three hours.
5 I won't get your attention for that long. I want to
6 do it with one, and then I'll briefly touch on the
7 others.

8 I want to talk about quench tower number 2,
9 because that was the main issue really with Mr.
10 Foersch. And you recall that Mr. Foersch candidly
11 and honestly admitted that he would have
12 discussions with Mark Kamholz about quench tower
13 number 2, and about this idea of the steam and if
14 you reduce the size of the tower, Mr. Linsin said
15 this is simple physics. No physics is simple. But
16 you reduce the size of the tower, as the steam goes
17 up, it doesn't go up as fast, so you're not pulling
18 those particulates up. And therefore the purpose
19 of the baffles is either limited or not existence.

20 And Mr. Foersch said yeah, we had those
21 discussions, and I agreed with Mark about that.
22 And he went on to say I talked to Henry Sandonato,
23 my supervisor, about it, and he agreed too, that
24 the baffles really weren't efficient. And I told
25 Mark that I didn't think that they were.

1 And he testified -- we ultimately got out of
2 him, as he had told Mr. Thurston, and as he
3 testified in the grand jury, he knew there were no
4 baffles in that quench tower number 2, he being
5 Mr. Foersch, he knew it. And when he was asked in
6 the grand jury -- and we brought this out on his
7 examination, when he was asked in the grand jury
8 well, you knew it, but why didn't you do something
9 about it, his response was, it was one of those
10 discretionary things. It was one of those
11 discretionary things.

12 That's what this case is about. It was 30
13 years, and that's what it was. And then April
14 of 2009 it all changes. And the question is, is
15 that fair?

16 Now, as far as the permit application was
17 concerned that Mr. Kamholz put in which reinforces
18 this, the government questioned this and tried to
19 suggest it was improper. But if you recall, when
20 the permit application was put in for the quench
21 towers, for quench tower number 1, which is the
22 east one that had the exemption, Mr. Kamholz in the
23 application cited the Air 100 permit. He put the
24 word in "exemption" I think.

25 For quench tower number 2, what Mr. Kamholz did

1 is he cited those two letters, the '96 and '97
2 letter, which kind of scratch your head and say why
3 would you cite the '97 letter that says you have to
4 have baffles? It's because it was known that even
5 though that was in the letter, that wasn't the
6 understanding. Why else would he cite that? And
7 what he also cited which is important is he cited
8 to the regulations. It's 6 New York Code Rules and
9 Regulation, NYCRR. You don't need to do know all
10 that. It's Part 214.

11 If you recall, there is a subdivision of Part
12 214 that says there is exemptions. And that's the
13 one that Mr. Kamholz cited. He cited 214.10, which
14 is the exemption section. He specifically told the
15 DEC and whoever was reviewing this what his
16 understanding was.

17 And then what happened? The permit comes out
18 and guess what? Condition 96 for tower number 1
19 says you got to have baffles. And condition 97
20 comes out for tower number 2 and that says you have
21 to have baffles. And you heard the government
22 argue that means you've got a problem with number
23 2. We're going to let you off on number 1, but not
24 on number 2.

25 But that's not even totally true, because Mr.

1 Eng testified that as far as the EPA was concerned,
2 it didn't matter for quench tower number 1 that you
3 had the exemption. The permit overrode that
4 exemption. That isn't the position the
5 government's taking here, but that was the attitude
6 of the EPA. And again, is that fair? Is that the
7 way our government should work?

8 So what we have happening at trial now is the
9 following. The government is willing to concede,
10 as I think they must, that the exemption applies to
11 tower number 1, this Air 100 from 1984, whenever it
12 was. They conceded that. And their point there is
13 how often the quench tower was used. I'll get to
14 that in a minute. For quench tower number 2 the
15 government is saying no, no, no, doesn't matter
16 what relationship you have with Mr. Foersch. It
17 doesn't matter that you put that exemption section
18 in your permit application, doesn't matter. You're
19 guilty of five separate felonies for not having
20 baffles in there, even though the DEC
21 representative knew about that.

22 So to apply this entrapment by estoppel defense
23 to quench tower number 2 the first question is was
24 there a disclosure of the condition or activity to
25 the governmental entity? And here there clearly

1 was. Mr. Foersch has acknowledged I knew there
2 were no baffles in quench tower number 2. So there
3 was a disclosure. He knew about it, no question.

4 And then number two, did Tonawanda Coke and
5 Mr. Kamholz rely upon the authority of whoever it
6 was that they were dealing with? Of course,
7 Mr. Kamholz did. He put it right in the permit
8 that he did. He cited those two letters, which
9 makes no sense, in the exemption section, and said
10 we don't need them for here.

11 Is there something inequitable about the
12 government now enforcing condition 97? Well, of
13 course there is. And does the evidence tell you
14 that even though condition 97 which said baffles in
15 question number 2, which was in effect from 2002 to
16 the present, that Mr. Foersch never enforced that.
17 Is there a certain unfairness there to now say
18 you're guilty of five felonies? We think so, and
19 that's why that that defense -- this is a textbook
20 case for this defense. And you don't get many of
21 them. But this is the one. And you have the power
22 to apply it to these facts.

23 Beyond everything else, proof -- if you ever
24 get to this point of saying we're convinced on
25 whatever count that guilt has been proven for every

1 element for that count, presumption is gone,
2 guilty. Even if you got to that point, you have
3 the authority to apply this defense, that's how
4 powerful it is. And it's a once-in-a-million
5 opportunity that you have. But it applies, it
6 applies in this case.

7 Now, I'm not going to go through the other
8 counts in detail, but I'm going to quickly suggest
9 to you why we think -- why we think it applies. To
10 the pressure relief valve, was there a disclosure?
11 Yes, there was. Of course there was. It was
12 disclosed in the emission study table back in July
13 of 2003. It was open and obvious. As Mr. Linsin
14 asked one of the witnesses, was a shroud put over
15 it? Of course not. It was out in the open. Even
16 Mr. Foersch, when he saw a picture of it said,
17 yeah, that sure looks like an emission point to me.
18 It was there. It was easily to be seen. It was
19 disclosed.

20 There were these full compliance evaluations
21 that you heard about. And the testimony is that a
22 full compliance evaluation is supposed to be done
23 every year. Every year. And it's supposed to
24 identify, not only the permitted emission points,
25 but also the unpermitted emission points. And

1 there's one of those completed every year. Every
2 year that said that Tonawanda Coke was in
3 compliance. And now to say five felonies for that,
4 is that fair?

5 Quench tower number 1, I'm not going to take
6 time on that. That comes down to whether you think
7 that there was evidence that you wouldn't hesitate
8 on that shows that that exemption doesn't apply.

9 In other words, that number 1 was being used more
10 than 10 percent of the time. I'll touch on that in
11 just a minute. The evidence isn't there to support
12 not applying that exemption. But even on that one,
13 what you have that suggests this unfairness is the
14 Eng email from December 30th of 2009, the Eng email
15 where he knows from Mr. Sitzman that this exemption
16 has existed at that point for 25 years, and he
17 represents the EPA and says it doesn't matter to
18 me. They missed it. He sends the email that says
19 DEC missed it, and Tonawanda Coke didn't notice it,
20 or something, not knowing about the relationship
21 that existed between Mr. Foersch and Mr. Kamholz.
22 And he says so we're going to site them for a
23 violation for that. Is that fair? Is that how we
24 want our government to act?

25 And then Counts 17 and 18, and this applies

1 more to 18. Eighteen is the count that has to do
2 with taking the substance out of that tank with an
3 excavator, putting it in a front end loader, and
4 taking it over and putting it into the coal piles.
5 And remember that in June of 2009 Mr. Corbett was
6 told about that by Mr. Kamholz, told about that by
7 Mr. Kamholz. And the fellow from the EPA,
8 Mr. Grossman, said don't tell Kamholz we have
9 concerns. We want to do some sampling before we do
10 anything.

11 In the intervening three months what
12 Mr. Kamholz told them they were going to do was
13 done. It was taken over and put in the coal pile.
14 Exactly what Mr. Kamholz said they were going to do
15 is done. And they come back in September '09, and
16 lo and behold, it's been done.

17 So now that's another felony count, because EPA
18 said, no, don't tell Kamholz not to do that. Don't
19 tell him not to do that, get a felony out of that.
20 Is that fair? Is that the way we want our
21 government to act?

22 It bothered Mr. Corbett so much, if you'll
23 recall, he went to Mr. O'Connor after he had been
24 interviewed by the government and said, you know,
25 this is bothering me. I've got to let you know. I

1 would have told him about this, but Mr. Grossman
2 told me not to. It's pretty sad.

3 And then for Count 19, the tar decanter sludge.
4 That's the stuff that they put in the front end
5 loaders and take it out to the coal pile. And
6 there what you have, you have the inspection
7 reports, the one from Mr. Fisher goes back to '89,
8 and they move forward. You have the disclosure.
9 You certainly have in -- before that you have the
10 EPA reports. But the key there is the 1989
11 inspection report, Defendants' Exhibit B.

12 And then you've got the later inspection
13 reports too, but that's not all you have. You have
14 Mr. Strickland's testimony, because what the
15 government kept trying to get these witness to say
16 is nobody went out and checked. And Mr. Strickland
17 said, no, it doesn't work that way. It's not just
18 based on conversation. These reports are based on
19 conversation and observation.

20 Where is Mr. Fisher? If it's otherwise,
21 where's Mr. Fisher? Where is he? Did you see him
22 take the stand? And who is it, who is it that
23 tells the DEC and EPA in April of 2000, who
24 volunteers that this is what they're doing? Mark
25 Kamholz during the air inspection has a

1 conversation with Cheryl Webster from the DEC, who
2 also wasn't called to testify by the government,
3 and tells her, oh, yeah, this is what we do. We've
4 been doing this for a long time.

5 She gets ahold of her supervisor, Sitzman.
6 Sitzman gets ahold of I think it's Strickland.
7 Strickland gets ahold of Corbett, that's how this
8 whole thing starts, because he tells Cheryl Webster
9 about it. And then when Mr. Corbett comes out in
10 June of '09, along with Mr. Grossman, and they talk
11 to Mark about it, he openly discloses this is a
12 routine practice. We've been doing this for a
13 long, long time. Disclosure, candor, openness, or
14 deception?

15 And every one of these conditions as soon as
16 Tonawanda Coke was told by the EPA you can't mix it
17 on the coal piles, you got to put baffles in, and
18 even with a PRV they weren't told anything. They
19 did it totally on their own. The PRV, set point
20 gets raised, and then it's blanked off by Tonawanda
21 Coke. Baffles are put in in both quench towers
22 within months, and immediately after the search
23 warrant Tonawanda Coke starts using the pad. As
24 soon as they are told this is how we want you to do
25 it, that's what Tonawanda Coke does.

1 The problem is for the 30 years before that
2 that's not what DEC told them. And that's why we
3 have this defense, that's why I say this is a
4 textbook case. Textbook case where that defense
5 applies.

6 Just something brief. Mr. Linsin asked me to
7 mention this. I stay away from these RCRA counts
8 like it's the flu, because I don't understand it.
9 But he wanted me to make the point. When you're
10 considering the RCRA counts, please don't make
11 judgments on how this was done and say well, maybe
12 this should have been done a different way. Accept
13 how it was done and assess whether or not that
14 violates RCRA. Maybe there was a better way that
15 you could have taken -- scooped the material out of
16 the abandoned tanks. But that's not for you to
17 decide. It's the way they did it, and you gauge
18 whether there is a violation or not on that -- on
19 that evidence.

20 I started out by talking about -- I can't
21 remember his name now -- Paul Harvey. And first
22 words I said to you were don't let the facts get in
23 the way of a good story. And I think that's --
24 that's what the case has been about. I want to
25 give you a few examples of what I'm talking about

1 and suggest to you that it carries over to all the
2 proof in this case.

3 Let's talk for a minute -- these are brief,
4 except for the last one. But let's talk for a
5 minute about the -- sorry. Judge, I'm sorry --
6 about the quench towers. And the issue here is
7 quench tower number 1 and whether the exemption
8 applies. Was quench tower number 1 used more than
9 10 percent of the time? We have two witnesses who
10 worked on the battery, worked on the battery for
11 years and years and years, Mr. Brossack and
12 Mr. Priamo, who said no. Quench tower 1 was -- it
13 was a backup. It wasn't used more than 10 percent
14 of the time. It was quench number 2 that we used.
15 In other words, the exemption applies.

16 And why is that important? Well, they work in
17 the battery. They work right where the quench
18 tower is used day-in and day-out. What does the
19 government want you to rely on? What do they want
20 you to rely on to find the exemption doesn't apply?
21 Do you remember Mr. Hoffmann? If I remember
22 Mr. Hoffmann he's the gentleman that was fired and
23 he doesn't know why he was fired, and from time to
24 time he would drive a pickup truck around in the
25 coal fields. And he said that he would stand out

1 in the coal fields and pay attention to which
2 quench tower was being used, and he would see the
3 smoke, and he'd watch the smoke blow with the wind.

4 Come on. Do you want -- you're going to -- in
5 a matter of importance to you you're going rely on
6 that kind of evidence as opposed to what
7 Mr. Brossack and Mr. Priamo say? I don't think so.
8 And that's just one idea of what I'm talking about.

9 Graphic example is the fire, the July 8, 2008,
10 fire. And the first -- my impression of that,
11 until we talked to Mr. Ianello and saw his video
12 clip was that this was an inferno, that this was a
13 huge fire that consumed two of the large tanks or
14 area of the tanks. It was a big, big fire.

15 And you had Mr. Dahl come in. And Mr. Dahl had
16 testified in the grand jury that he saw a little
17 tar seeping out of one of the tanks during the
18 fire. And he got on the stand here and testified
19 that he saw -- I don't know how many front end
20 loaders come flowing out of those tanks, and he
21 said it was 10 or 20 tons, 10 or 20 tons flowed out
22 of there.

23 We called Mr. Ianello, someone the government
24 had talked to. We put Mr. Ianello on the stand,
25 the fire chief. He brought the video clip with

1 him. And we found out this was not an inferno.
2 His testimony was he didn't see any -- anything
3 coming out of the tanks at all. And if you want to
4 consider the government's suggestion, well, it was
5 coming out underneath the water, I guess you can,
6 but is that speculation? And are you supposed to
7 rely on speculation? I don't think so.

8 And he played that video clip and we played it
9 over and over, and it became clear there was a lot
10 of smoke. And we've heard the expression, my
11 grandmother used to say -- she'd laugh and say
12 where there's smoke there's fire. I never really
13 knew what that meant. What I understand that to
14 mean that isn't true that where there's smoke
15 there's fire. And there was a lot of smoke. There
16 was a lot of black smoke, but there wasn't much
17 fire.

18 What you heard from Mr. Ianello was that this
19 fire was limited to about one-quarter or one-third
20 of one tank in the southwest corner of the tank.
21 There was that building, that's where the fire was.
22 That's what the video clip showed.

23 On cross-examination the government played that
24 video clip for Mr. Ianello and said, do you see
25 this area over here, you're saying the fire wasn't

1 over here, and there was that other area where a
2 tank had been torn down, that either Mr. Dahl or
3 Mr. Hoffman, one of the government's witnesses
4 said, yeah, the fire was over there. Mr. Ianello
5 said clearly the fire wasn't over there, no where
6 near there.

7 And the government asked Mr. Ianello is it
8 possible that the Tonawanda employees put that out
9 before you got there? That's not the kind of
10 evidence when we're talking about what's at stake
11 here that you should be relying on. And then
12 played the clip again and based on how the smoke
13 was traveling tried to suggest that that meant the
14 fire was over there, because the smoke was blowing
15 in a northerly direction. That's not good
16 evidence.

17 This is a serious case, and you got to make a
18 determination that overcomes the presumption of
19 innocence and finds guilt beyond a reasonable
20 doubt, and it can't be based on that type of --
21 that type of testimony.

22 The last thing that I want to cover, and I'm
23 going to shorten this up, which should make you
24 happy, because I would love to put this out there,
25 but there's not time. I want to talk about the

1 government's summary chart. I'm going to try to do
2 it without putting it up there.

3 Remember Mr. Conway testified about this? You
4 have the orange chart and then you have the green
5 chart for the months. And those charts, there
6 is -- there's nothing about those charts that you
7 can rely on. But the government wants you to rely
8 on those. And hopefully you can remember this from
9 my examination. But I feel like I've taken too
10 long.

11 Government Exhibit 200 is the orange chart, and
12 that purports to have in it Mr. Conway's review of
13 every single one of the by-product operator log
14 books. And every time the set point changed, he
15 put it in there. And recall that based on that he
16 then look's at the circular charts, and every time
17 he sees a spike above what he decided that set
18 point was, he's going to call that a release, and
19 he's going to prepare this chart, and it's going to
20 show that this PRV was releasing about twice an
21 hour. That's what he claims -- the government
22 claims the chart shows.

23 And what we attempted to show on cross were any
24 number of things why this was really bad, bad
25 information. And the first is if you go back and

1 you look at the orange chart, there are 2 instances
2 on the chart, one is for August 29th of 2007 and
3 October 7 of 2007, where the entry for August
4 29th will show one set point, and when you look at
5 the very next entry that they've shown, it clearly
6 indicates between the first and the second entry
7 there's been a change, and it's not reflected
8 anywhere. And that happens twice on the charts
9 between August 29th of '07 and October 7 of '07.
10 And it happens again between September 30 of '08
11 and March 2nd of '09.

12 Remember with Mr. Conway when I asked him about
13 the first one, his response was, well, that doesn't
14 matter because that's not part of my charts,
15 because his charts only went through '09. Well,
16 guess what? As I just indicated, the second time
17 it happens it does affect his charts, and it
18 affects the entries for January and February. They
19 are clearly wrong, because he has missed the fact
20 that at some point between September 30th of '08
21 and March 2nd of '09 there was a change in the set
22 point. We don't know when it was. Was it
23 March 1st of '09? Was it October 1st of '08? We
24 don't know. But you got that chart in evidence and
25 you're supposed to rely upon that to determine if

1 the company and Mr. Kamholz are guilty. You can't
2 use that chart for anything except as an indication
3 of the quality of the evidence -- or lack of
4 quality of the evidence that's been presented to
5 you.

6 You were told that Mr. Conway skips April
7 of 2009 because that's an unreliable month.
8 Apparently because the inspection happened and
9 Mr. Cahill says he raised and dropped the set
10 point, so they skip April of 2009. So what do they
11 do for May of 2009? He uses a setting from March
12 of 2009, even though he's admitted that -- that you
13 can't rely on April. We know there were changes in
14 April. But he takes a setting in March and uses
15 that in May. So May is not -- is not reliable.

16 You know that it was never calibrated. You
17 know that he relied on testimony outside the
18 courtroom that we don't know about. You know that
19 there were other changes that were shown in the log
20 book that he just ignored because there wasn't a
21 number. It wasn't convenient to use those, because
22 there that was an indication the set point changed,
23 but since you didn't know what the number was, he
24 ignored it and just didn't use it. And yet you'll
25 get this chart.

1 You know from Mr. Sitzman that he determined --
2 Mr. Sitzman determined that that PRV was not
3 releasing as of the fall of '09. But look at
4 Mr. Conway's chart, and he's got it releasing every
5 half hour.

6 And this is the most troubling part of all.
7 There is a Government Exhibit -- this is the one I
8 want to put up please, Government Exhibit 88-0122.
9 This is from -- well, let's just make this part
10 bigger please.

11 This is very important. July 30th, 2009. And
12 the entry right there, the note. We do have radios
13 and a phone. If Mr. Cahill makes an adjustment on
14 anything, I believe it would be appropriate to
15 inform operators.

16 That doesn't appear in Mr. Conway's chart.
17 It's smack dab in the middle of the summer of 2009.
18 It's important for a couple reasons. Number one,
19 it shows that Mr. Cahill was making changes and not
20 putting them in the book. It also shows he was
21 making changes in the summer of '09 that aren't
22 reflected anywhere, and the government just ignores
23 that when it makes this chart to argue to you that
24 these releases continued every half an hour through
25 all of 2009.

1 How can you do that? How can you do that and
2 expect you as a jury to rely on that evidence as
3 proof of anything? It just -- it defies logic.
4 And is it fair to do that?

5 And then Mr. Cratsley -- you're not going to
6 remember this -- on top of that, Mr. Cratsley, who
7 is one of the by-products operators -- you can take
8 that down -- he testified too that as of the time
9 of the search warrant the setting was at 160. 160.
10 There's nothing close to that in Mr. Conway's
11 chart. And the other thing that Mr. Conway
12 acknowledged is he reviewed every single one of
13 these log books, and indeed Mr. Cahill never put
14 his entries in the log book.

15 I'm done. I'm not going to do any fancy wrap
16 up. I'm not even going to thank you for listening.
17 I'm not even going to do that. The one thing I'm
18 going to say, I am going to say Mark didn't
19 testify. My decision. You've heard enough. You
20 don't need testimony from him. There is reasonable
21 doubt on every one of these charges. We've
22 established entrapment by estoppel defense by a
23 preponderance, and I will say thank you for your
24 attention today, for the entire trial, for your
25 questions. Never had an experience like this

1 before. Thank you very much.

2 THE COURT: What are you thinking? Ready
3 for a break? How about if we take 15, okay, and
4 then we will have the rebuttal argument, and then
5 we'll break for lunch. Does that work for
6 everybody? You've been terrific. Thank you.

7 (Jury excused from the courtroom.)

8 THE COURT: Okay. We will see you in 15
9 minutes.

10 MR. LINSIN: Thank you, Judge.

11 (Short recess was taken.)

12 (Jury seated.)

13 THE COURT: Welcome back. Please have a
14 seat. Okay. The attorneys and parties are back,
15 present. Our jury is back, roll call waived. This
16 will be, ladies and gentlemen, the last of the
17 arguments. And if you recall, whatever the
18 attorneys say and I say that's not evidence.
19 Please don't lose sight of that. And please don't
20 make up your mind on this case until you commence
21 your deliberations, and then you will have
22 everything you need at that point in time.

23 The gentleman sitting on the edge of his seat
24 there ready to get up, Mr. Piaggione, is ready with
25 I think his rebuttal argument. Mr. Piaggione.

1 MR. PIAGGIONE: Thank you, your Honor.

2 May I proceed then?

3 THE COURT: You may proceed, yes.

4 MR. PIAGGIONE: Thank you. Mr. Personius,
5 Mr. Linsin, Miss Grasso, ladies and gentlemen of
6 the jury, I've been sitting here waiting for about
7 five weeks to speak to you, and I'm just hoping
8 that you're not too tired to listen at this point.

9 I would first of all thank you again for your
10 service. I know some of you did not want to be
11 here. But you did make the effort and you did show
12 up, and you did make -- came every day and showed
13 attention, and I applaud you for that, and thank
14 you for that.

15 But I'm going to ask you for your patience and
16 attention just a little longer. This is the
17 government's opportunity to respond to those last
18 three hours of arguments you heard from the
19 defendants. And throughout this whole proceeding,
20 the Court has told you use your common sense in
21 evaluating these facts. Use your common sense, and
22 the government wants you to follow that advice
23 because if you do, you will look right through the
24 defendants' arguments and realize that they're --
25 they don't hold -- they don't hold up.

1 I'm going to first try and address Mr. Linsin's
2 arguments, and then I want to clear up some of the
3 confusion Mr. Personius apparently expressed in his
4 argument. The thing to remember though is don't
5 let the defendants' arguments make you think
6 there's some sort of alternative reality in this
7 courtroom.

8 You know, use your common sense. If two plus
9 two equals four outside this courtroom, it equals
10 four inside this courtroom. And this concept that
11 the defense has put forth of a perspective of 20 to
12 30 years of environmental compliance, when you look
13 at it through common sense, you realize it's 20 to
14 30 years of environmental deception.

15 Defendants argue that, first of all, if you
16 remember that the cost of compliance was minimal.
17 I wonder if I can have 15.02.003, Miss DiFillipo.

18 Do you recall this place looked like during the
19 April 2009 inspection? This is a tank in
20 operation.

21 Can I have 15.02.015 please, Miss DiFillipo?

22 This is where this machinery was spewing oil,
23 so to prevent people being sprayed by it, they put
24 a rag over it. Does this look like a company who
25 invested in its operations? And if the costs of

1 compliance was minimal, then why ask for an
2 exemption for the west tower to begin with? Why
3 not just put the baffles in in 1984 and use it
4 whenever you wanted to?

5 Why resist putting in an automatic flare on the
6 battery when the regulation was passed? If you
7 remember, they tried to say we don't need one, and
8 then the EPA had to come back and said, no, you
9 have to put one in. Why not replace the baffles in
10 the east quench tower in 1997? If it didn't cost
11 them anything, why not just do it? And why not get
12 a permit and a flare on the bleeder valve in the
13 by-products area?

14 The government submits you might consider
15 because the defendants did not want to spend a dime
16 more than they had to on environmental compliance.

17 And I don't want you to get confused with the
18 defendants' claims of estoppel by entrapment.
19 Estoppel by entrapment defense requires the
20 defendant to reasonably disclose its conduct before
21 or at the time it claims the government authorized
22 it. Okay. And they had to rely upon that
23 authorization to commit this conduct. In other
24 words, if the defendants committed an illegal act,
25 then went back and disclosed it to the government,

1 that is not estoppel. They have to seek that
2 approval before or at the time they commit this
3 illegal act, and that's important to understand.
4 That the government has to be aware of what is
5 going on and then authorize it. It's not if the
6 government conducts an inspection and doesn't
7 detect a violation. That's not estoppel.

8 Now, let's consider defendants' arguments as
9 they look -- if you look at them through just plain
10 common sense, okay? First of all, Counts 1 through
11 5 there is this claim that this was open and
12 obvious. First of all, if you recall, the DEC was
13 there less than twice a year. They were there to
14 do inspections which were focused on the battery,
15 not on the by-products area. These annual
16 inspections, as the inspectors indicated, the one
17 inspector indicated didn't physically check every
18 condition. What they did is they relied upon the
19 defendants to be in compliance on those conditions
20 they didn't check.

21 And as it was testified to, Mr. Kamholz knew
22 where the inspector went. When he accompanied the
23 inspector, he could see where he went. So he knew
24 what the pattern was. And if you remember,
25 Mr. Foersch said he was in the by-products area 15

1 times in 25 years. Fifteen times. So, he did not
2 notice the bleeder valve.

3 If you recall, he didn't have to walk past the
4 bleeder valve either. On direct testimony
5 Mr. Foersch indicated he was driven to the
6 by-products area by Mr. Kamholz. So he was there
7 15 times.

8 Now, you recall Mr. Kibler. He said he was
9 there a thousand times. That was his testimony, a
10 thousand times. He came -- his testimony also said
11 he came within 10 feet of the by-products area. He
12 was there a thousand times and never noticed the
13 bleeder valve.

14 So I submit to you it's not so open and obvious
15 as the defendants are claiming it is. Common sense
16 tells you the government doesn't even have to make
17 this argument really, if you think about it. The
18 Clean Air Act requires that the defendant get a
19 permit for its emission sources, including that
20 bleeder valve. It's the law. And it's not
21 conditioned upon only if the DEC finds it. They
22 have that obligation to put it on their permit.

23 Let me give you a common day analogy to this.
24 If you drive in Buffalo, you have to get a driver's
25 license. That's the law. It's incumbent upon you

1 to take that test and get the license and pay a
2 fee. Okay. Suppose someone here in Buffalo
3 decides he's not going to get a driver's license.
4 And he drives around Buffalo for 20 years.

5 Now there are some days when you drive around
6 Buffalo that idea might not be so farfetched. But
7 the fact of the matter is one day this driver gets
8 stopped by the police, and he gets arrested for
9 driving without a license. Now is it a defense for
10 that driver to say I've been driving around Buffalo
11 for 20 years openly and honestly, obviously. I
12 drove past the police station every day. I drove
13 past police cars every day. I even stopped and
14 talked to the police. One time I got a parking
15 ticket, and I went into the police station and paid
16 it. They asked me for ID. I said I don't have a
17 driver's license, will this due, and they accepted
18 that and they never arrested me. I've been misled
19 by the police into believing I could drive without
20 a license. Does that make sense to you? Just
21 everyday common sense?

22 Using your common sense with the facts in this
23 case, you can see that. Did the defendants rely on
24 the conduct of the DEC to commit this violation of
25 operating this bleeder valve, or did the defendants

1 commit this violation relying on not getting caught
2 by the DEC? That's the difference. Did they rely
3 on something the DEC did, or rather that they
4 figured out the DEC was not going to do? They were
5 not going to find this bleeder valve. And if it's
6 the latter, it's not estoppel.

7 Now, let's look at this, what I would call, a
8 fairy tale about the HAPS report constituting
9 notification to the DEC. Let's put this report in
10 context of common sense. The HAP report is about
11 regulations that come out a year after the
12 defendants got their Title V permit. And it is
13 submitted by the defendants to the DEC, again, in
14 an attempt to exempt Tonawanda Coke from new
15 environmental regulations. And Mr. Kamholz signed
16 that report saying if you have any questions, ask
17 me about it. And they submit in that report this
18 infamous table 4.2.

19 Can we have Exhibit 131.4-2, please? Okay.
20 Thank you. All right.

21 Now, if you look at this table, there is a
22 pressure relief valve in the coke oven gas system.
23 There's also a valve listed in the coke oven gas
24 system. In the light oil system there are no
25 pressure relief valves listed. According to this

1 table, this pressure relief valve is not really
2 emitting anything. This maybe has a leakage
3 problem, and that's what that little formula
4 indicates .00030. There's a leak coming there.

5 Certainly there's nothing on this pressure
6 relief valve that indicates it's emitting 137 tons
7 of coke oven gas. And again there's no separate
8 entry for a pressure relief valve in the light oil
9 system.

10 Miss Henderson, can I have Defendant's Exhibit
11 FFFF please?

12 Now this is defendants' diagram of what the
13 coke oven gas system is. This is their
14 description, not the government's, okay? The
15 government agrees this is accurate. If you notice,
16 part of the coke oven gas system is the light oil
17 scrubber, okay? Now, defendants try to claim that
18 the light oil scrubber is part of the light oil
19 system, but clearly there's overlap. It's listed
20 there as part of the coke oven gas system.

21 Now, do you remember Miss Hamre's testimony? I
22 wonder if I could -- thank you, Miss Henderson.

23 I wonder if I could have Exhibit 15.01.061,
24 please?

25 Now, Miss Hamre said when she was going through

1 the by-products area they found a pressure relief
2 valve. Right there. And if you notice, it's not
3 one that actively emits gas. It waits, if there's
4 a problem, it would open. The only thing it may
5 have is an issue of leaks. There is no separate
6 entry again on that table that says there's a
7 pressure relief valve in the light oil system.
8 There's only one pressure relief valve listed
9 between the light oil system and the coke oven gas
10 system.

11 If I can go back to 131.4-2 please. Okay.

12 Again, if there was -- there is valves -- and
13 valves there. But there is a separate entry for
14 pressure relief valves. So between the two systems
15 for this to be accurate, there has to be either a
16 separate entry for a pressure relief valve in the
17 light oil system, or there has to be two pressure
18 relief valves in the coke oven gas system.

19 And if you look at it, which is the -- now we
20 know there is a second pressure relief valve in the
21 coke oven gas system. It's the bleeder valve. And
22 if you look at this description, this is not the
23 one that's emitting 173 tons of coke oven gas. In
24 other words, the one that was left out was the
25 bleeder valve. The government submits that this

1 HAP report didn't notify anyone about the bleeder.
2 It wasn't even included in the report. The only
3 pressure relief valve listed here is the one on the
4 light oil scrubber, which by the defendants' own
5 admission, is part of the coke oven gas system.

6 You can consider that this claim now, that the
7 HAP report provided some sort of notification about
8 the bleeder valve is a story made up after the
9 defendants got indicted. If you look at it, that
10 makes -- doesn't that make common sense to you? If
11 they wanted to include the bleeder valve, there
12 would have been a second entry. Or if they wanted
13 to distinguish there would have been one in the
14 light oil system.

15 Now do you recall, while we're on this subject,
16 that Miss Hamre -- take this down. Do you recall
17 Miss Hamre testified that the defendant told the
18 EPA inspection team there was no pressure relief
19 valves in the coke oven gas system? And it was not
20 in reference to the battery. That was her
21 testimony. Defendants have tried to claim she
22 didn't hear that correctly or she misheard it. It
23 didn't happen.

24 Well, remember Mr. Linsin's question. He asked
25 who in their right mind would claim there was no

1 pressure relief valves knowing there was one out
2 there? Okay. Well, that would be the one who
3 in 2009 had not included the bleeder valve in the
4 HAP report. There had been no notification of the
5 bleeder valve to the DEC or the EPA. And who told
6 Pat Cahill not to have the bleeder valve go off
7 during the inspection? As far as he knew there was
8 no one in the government who knew about that
9 bleeder valve.

10 And Mr. Linsin's second question referring to
11 his claim that Mr. Foersch's testimony that
12 Defendant Kamholz knew there were baffles in the
13 east quench tower was fabricated. Remember that
14 one? He said who in their right mind would tell an
15 inspector there were baffles in the number two
16 quench tower knowing they were not?

17 Can I have Exhibit 131.2-10 please?

18 Well, right there, that would be the same one
19 who would put in a HAP report there were baffles in
20 the tower six years after they were removed.
21 That's in the report. And the answer to that is
22 the same, it's Mark L. Kamholz.

23 Some other statements I want to clarify the
24 defendant made about these issues was coming out of
25 the bleeder valve was this un -- I think it was

1 called purified gas, uncontradicted that it was
2 purified gas coming out of the bleeder. Now, it's
3 your recollection, not mine. But do you recall
4 testimony about the bleeder valve being caught on
5 fire twice? That in the winter there were
6 emissions, that employees saw crystallized
7 naphthalene in the air from the emissions from the
8 bleeder valve, and that others smelled coke oven
9 gas when it was released, and when the light oil
10 scrubber went out of commission in 2008 meant there
11 was going to be more benzene in the coke oven gas.
12 Does your common sense tell you that sounds like
13 purified gas?

14 Or the defense statement that the bleeder valve
15 was insignificant? That was Mr. Linsin's words.
16 This bleeder valve was emitting 173 tons of benzene
17 loaded coke oven gas a year. As presented at
18 trial, that evidence, that amount alone would
19 qualify a facility as a major source. It is
20 submitted that perhaps the DEC might not find that
21 so insignificant. Again, if it had been notified.

22 With respect to the defendants'
23 characterizations regarding emission source and
24 emission point, well, if you recall, both
25 Mr. Carlacci and Mr. Sitzman stated that while

1 there was separate definitions in the regulations,
2 that in this case and in many other cases, an
3 emission source and emission point can be part of
4 the same thing. The valve is the apparatus or the
5 equipment that releases the gas. And the pipe is
6 the point from which it goes into the environment.

7 They both said that -- that they -- they would
8 have this bleeder valve on permit. That was
9 uncontradicted. There wasn't a question of
10 emission source or emission point. But even that
11 argument, if you look at it from common sense,
12 let's look at it this way. On top of the battery
13 there is a flare stack. And when the coke oven gas
14 pressure builds up in the battery, for some reason
15 like the exhauster wasn't working, someone has to
16 go up and turn a valve manually. That is the
17 emission source, and this battery flare stack lets
18 the gas come out and there is an automatic pilot
19 light that sets it on fire if it's working, so that
20 the escaping coke oven gas isn't emitted into the
21 environment. Okay. So there is your emission
22 point and emission source together.

23 The defendants knew this had to be on its
24 permit. And it had to be flared if it was going to
25 comply with the Clean Air Act. Now right down the

1 road in the by-products area is this other emission
2 source where, when the coke oven gas builds up, it
3 has an electronic set point that opens the valve,
4 that's your emission source, and it goes up the
5 pipe, that's your emission point. And that is done
6 every day, daily, when there is a reversal in the
7 ovens.

8 The defendants knew how to include the battery
9 flare stack that was used occasionally in its
10 Title V permit. Does it make sense the defendants
11 didn't understand that they had to also include the
12 bleeder valve, which was doing basically the same
13 thing every day? Does that make common sense to
14 you?

15 Let's talk about the east quench tower. That's
16 Counts 11 through 15. Now defendants have argued
17 that they were misled by Gary Foersch into
18 believing there were no need to put baffles in that
19 tower. Now, again, just use your everyday common
20 sense in looking at that. First, defendants
21 request in this letter that they're going lower
22 the -- lower the tower. And if you recall,
23 Mr. Foersch wrote back and said in clear
24 instructions, you can lower it, but you have to
25 have baffles in that tower.

1 In fact, he testified on the stand it was for
2 the very reason that he didn't know if the baffles
3 were on the top of the tower or the bottom of the
4 tower that he put that in there to make sure those
5 baffles were there.

6 Now if you recall, Jon Rogers testified that
7 the baffles were removed when the tower was lowered
8 and never replaced. So the defendants now claim
9 estoppel because Kamholz relied upon what Foersch
10 said. Well, what part of that letter did Kamholz
11 rely upon to remove the baffles? Remember estoppel
12 only applies when the reasonable disclosure of the
13 activity before or at the time of the conduct is
14 authorized.

15 So, defendants went out and did this based upon
16 a letter that said you can't do it. And now
17 they're claiming they have authorization to do it.
18 Does that make common sense to you?

19 Do you recall again that Mr. Foersch stated
20 that the inspector went everywhere -- that
21 Mr. Kamholz went everywhere the inspector did? He
22 knew that the inspectors rarely checked for baffles
23 in the east quench tower. Mr. Foersch testified to
24 that. He said it was a dangerous place to go. It
25 was out of the way. They didn't really want to go

1 there. And the main focus of the inspections every
2 year was on the battery, not on the quench towers.

3 You can consider that the Defendant Kamholz
4 made a calculated decision not to replace the
5 baffles in the east quench tower to save money.
6 And remember at that time, 1997 when this happened,
7 Mr. Kamholz had already gone three years with the
8 illegal removal of that automatic pilot light in
9 the battery flare stack, and the DEC had not
10 discovered it. It would take another 11 years
11 before DEC discovered that violation.

12 So Defendant Kamholz removed the baffles in
13 contradiction to the DEC letter stated, and before
14 having any conversation with Foersch about it. You
15 can consider that he made a calculated risk.
16 Basically, he didn't rely upon anything Mr. Foersch
17 said. He relied upon Mr. Foersch not catching it.

18 With respect to this idea that he put it in his
19 application for Title V, this reference to these
20 letters, well, the letters, all they say is you
21 have to have baffles. And if the height of the
22 tower isn't sufficient, it's conditioned on you
23 raising it. So is the reference to a condition of
24 raising the tower, lowering the tower, but there's
25 nothing about baffles in that.

1 I submit to you you may consider that his
2 attempt to refer to that letter was an attempt to
3 sneak past the DEC authorization that he couldn't
4 get if he applied for a modification. And the
5 testimony is the defendant knew how to apply for a
6 modification of his permit, and he knew it had to
7 be in writing. Again he didn't rely on
8 authorization from Gary Foersch. He relied on not
9 getting caught by Gary Foersch.

10 Let's look further at Defendant Kamholz and
11 what he relied upon regarding Mr. Foersch's conduct
12 even after he removed the baffles. Now again, it's
13 your recollection that counts, not mine. But do
14 you recall Mr. Foersch's testimony that he had many
15 conversations with defendant regarding
16 inefficiencies of the baffles, and he agreed with
17 the defendants' theory? However, Mr. Foersch was
18 clear on one point. He never told the defendant he
19 could operate the east quench tower without
20 baffles. Yes, I agree with you, Mr. Kamholz, but
21 the regulations say you have to have baffles. What
22 are we going to do?

23 And in addition, the defendant knew, as
24 Mr. Foersch testified, that Foersch didn't have
25 authority to change the permit. He didn't have the

1 authority to make modifications to the permit
2 without it being in writing. The defendant knew
3 the procedure, he knew how to do that. So is there
4 any basis for Mr. Kamholz to reasonably rely on
5 Gary Foersch, the inspector, modifying his Title V
6 permit orally? Does that make any common sense to
7 you?

8 You recall the testimony of Mr. Foersch there
9 was sometime post-1997 where he lowers the tower --
10 after the tower was lowered, maybe as late as when
11 the Title V permit was issued. It's not really
12 clear. Mr. Foersch went to the east quench tower
13 with Mr. Kamholz. And they observed -- he doesn't
14 really recall. He remembers it was a violation.
15 He doesn't remember if it was no baffles or partial
16 baffles. And what did he say? What did he do?

17 (Interruption by telephone malfunction in
18 the courtroom.)

19 THE COURT: Okay. Lets get back to
20 serious business.

21 MR. PIAGGIONE: Okay. With respect to
22 Mr. Kamholz, he's looking up into the tower, and he
23 says to Mr. Foersch -- reverse that. Mr. Foersch
24 is looking up in the tower and he says to Mr.
25 Kamholz, you've got to put baffles in that tower,

1 okay? If you recall, Kamholz didn't say in
2 response well, I thought you gave me authority not
3 to put baffles in the tower. He didn't say
4 anything.

5 You have to draw your own conclusions about Mr.
6 Foersch, whether Mr. Foersch was the type of person
7 who could be easily manipulated or not. But do you
8 recall Mr. Foersch said he trusted Kamholz. He
9 trusted him to correct violations when they were
10 pointed out to him. He relied upon the defendant
11 to put the baffles back into the tower. And as he
12 testified, he said he didn't follow up right away,
13 because he believed Mr. Kamholz was going to do
14 what he told him to do.

15 However, as Mr. Foersch stated, he felt in his
16 gut that maybe Mr. Kamholz didn't do what he was
17 supposed to do, that he didn't replace the baffles.
18 So the next annual inspection a year later he asked
19 the defendant were there baffles in that tower, and
20 defendant said yes.

21 Now defense now tries to claim that it didn't
22 happen, that he misremembered, that he was making
23 this up. But one thing he was clear about
24 throughout his testimony, he never told Mr. Kamholz
25 to operate that tower without baffles.

1 And this was a continual theme about
2 misremembering that Mr. Personius put forth. When
3 Kamholz said something that was incriminating, he
4 claimed it wasn't clear what Mr. Kamholz said. If
5 someone remembered something that was incriminating
6 about Mr. Kamholz, he said they misunderstood, or
7 it didn't happen. So Miss Hamre didn't hear
8 Mr. Kamholz say there were no pressure relief
9 valves in the system. And Mr. Foersch didn't hear
10 the defendant say yes, there were baffles in the
11 tower. Does that make really a lot of common sense
12 to you?

13 Looking back now, of course, Mr. Foersch was
14 asked on the stand, knowing that he had been misled
15 by Mr. Kamholz, that maybe in his heart of hearts
16 he knew that Kamholz may not have replaced the
17 baffles. Well, looking back like that, he had to
18 reflect, and he had to admit maybe that was true.
19 But that made no difference, because he never told
20 the defendant that he could do it. There was
21 nothing for Mr. Kamholz to rely upon. And he knew
22 that Mr. Foersch did not have the authority to
23 change the permit.

24 And if the -- if Mr. Kamholz was really relying
25 upon those conversations with Foersch, why did the

1 defendant state in the HAP report -- can I have
2 131.2-10 please again?

3 Why does he state again that there are baffles
4 in the tower in the HAP report six years after the
5 baffles were removed? Why did he put in his
6 application for renewal of his Title V permit
7 in 2006 that there were baffles in the east quench
8 tower? Was he relying on Mr. Foersch's authority?
9 If he was, why didn't he put it in these documents?

10 Again, it's not because he relied on
11 Mr. Foersch. He relied on Mr. Foersch not finding
12 out, not getting caught. The fact that
13 Mr. Foersch, knowing Mr. Kamholz gave him a break
14 and give him a warning, put the baffles in rather
15 than write out a NOV, should be held against
16 Mr. Foersch that somehow now the defendant was
17 relying upon him not to follow-up? Is that really
18 what this is about? Is that really relying on Mr.
19 Foersch, or is that relying on Mr. Foersch not
20 finding out? There's a difference there.

21 He wasn't relying on Mr. Foersch giving him the
22 authority, because if he did he would have
23 represented that. On more than one occasion that
24 he had, every compliance report, every year that he
25 submitted to the DEC, baffles in the east quench

1 tower. In the HAP report, baffles in the east
2 quench tower. In the Title V renewal, baffles in
3 the east quench tower. Does that sound like he was
4 relying on Mr. Foersch, or was he relying on not
5 getting caught? Common sense tells you what the
6 answer to that is.

7 Now, also this question about why didn't we
8 call Mr. Foersch, why didn't we call Mr. Fisher,
9 why didn't we call Miss Webster? Well, the
10 government decides how it can prove its case, and I
11 submit to you the government proved its case by
12 simply showing what are the permit conditions and
13 through the testimony of the employees, what were
14 the conditions at the plant. That's it. That's
15 the violation.

16 We don't have to call -- we didn't call
17 Mr. Foersch. We didn't call any air inspector and
18 we didn't call Mr. Fisher, we called the inspector
19 that was there at the time of the time period from
20 which the indictment was charged. Okay. Consider
21 how long this case would have been if we called
22 every inspector that came in that went to Tonawanda
23 Coke Corporation. We have to make a decision
24 what's going to be efficient, what's going to keep
25 your attention, and that's our decision.

1 Let's -- since I mentioned Mr. Corbett, let's
2 move over to Counts 18 and 19. Those are the
3 disposal charges. Now, there is a lot Mr. Linsin
4 said was based upon what Miss Williams told you. I
5 would ask you to recall my attempts to ask
6 Miss Williams a simple yes or no question and what
7 the answers were like. Usually 15, 20 minutes
8 later I got to ask my next question.

9 Now, it's your recollection that counts, but
10 remember I asked her your resume indicates that you
11 testified 40 times in the last 25 years, 40
12 times -- over 40 times, excuse me, in the last 25
13 years. And her response was I haven't bothered to
14 count them. Okay.

15 Now it's up to you to consider motivations.
16 It's up to you to figure out if she was being
17 evasive when I was trying to ask her questions.
18 But you can consider is Miss Williams a
19 professional witness, paid to provide the answers a
20 company pays her to get? If they want an opinion,
21 do they pay her to come up with that opinion? So
22 is it a surprise that Miss Williams' testimony
23 disagreed with every DEC, every EPA expert, even,
24 Mr. Corbett, the RCRA inspector? Her testimony
25 disagreed with all of them.

1 And then she gives her opinion as to what the
2 RCRA inspectors were doing out at Tonawanda Coke.
3 This is a woman who never conducted a RCRA
4 inspection, never inspected a coke production
5 plant, never saw hazardous waste recycled, never
6 went to Tonawanda Coke Corporation. And she's
7 going to tell us her opinion as to what the
8 inspectors were doing when they were out there
9 doing a RCRA inspection. Does that make any common
10 sense to you?

11 But let's compare what the defendants are
12 saying now with what the defense actually did
13 during this time period. Now, if you recall,
14 defendants seem to always try to say the pad was
15 built for storage. Really, let's see, and think
16 about that. You can consider if the defendant
17 built that pad to mix hazardous waste properly and
18 then they choose not to use the pad, are they
19 knowingly violating the law? Consider that. And
20 let's look at this.

21 First of all, we know in 1992 the K087
22 recycling laws are passed, the regulations which
23 say you can recycle this, you don't have to pay for
24 disposal of your K087 anymore. You can recycle it
25 into your coke ovens as long as it isn't land

1 disposed, as long as it doesn't hit the ground.

2 Well, coincidentally Tonawanda Coke in 1994
3 puts in a concrete pad with walls on it that
4 curiously enough looks like a mixing pad where it's
5 legal to recycle your hazardous waste by mixing it
6 on that pad and transferring it over to the ovens
7 without it touching the ground. All right.

8 Now if you recall Mr. Ohar's testimony, Mr.
9 Ohar was the engineer who was there when the pad
10 was installed. And what was the first thing they
11 did at that pad? They held a demonstration mixing
12 K087 waste with coal on the pad. That's what they
13 did. They didn't demonstrate storage. They
14 demonstrated mixing of K087 waste on the pad, and
15 then they took a crane and they put it over on to
16 the belt that goes to the ovens. And it did not
17 hit the ground. No land disposal. A legal form of
18 recycling. Okay.

19 Is that consistent with putting that pad in
20 just for storage? Is that consistent with the
21 defendants' argument that mixing of K087 and coal
22 on the coal piles is appropriate? Now, again, it's
23 your recollection, not mine, but if you recall
24 testimony from Mr. Snyder and Mr. Rogers about the
25 installation of a pug mill.

1 Can we have Exhibit 3.02 please?

2 Do you remember this? The pug mill is over
3 here. I'm a little off. That's a tree. But close
4 enough to the pug mill. What was the purpose of
5 the pug mill? Do you remember? It was to mix the
6 K087 sludge on the pad and go up that ramp and on
7 to -- if you look behind -- on to that belt back
8 there to the coke ovens. That was the purpose of
9 that. Is that consistent with storage? Is that
10 why the pad was there, for storage? Why put the
11 pug mill there?

12 Now, can I have 3.03 please?

13 I just want to show you there's the pad with
14 the rain runoff contained on the pad. That's the
15 purpose of the pad, to prevent lateral distribution
16 of contamination. And what happens is if you mix
17 the sludge and the coal with that, that all gets
18 thrown back into the coke oven.

19 Now, what Mr. Snyder and Mr. Rogers said was
20 the pug mill didn't work. It kept breaking down.
21 It spilled things. So, the defendants had a choice
22 at that point. And that is the crucial issue here.
23 They had the choice, do they spend more money, more
24 time mixing it on the pad and finding a way to get
25 it to the coke ovens without it hitting the ground,

1 or do they go back to their old ways and put it
2 back on the coal piles, knowing full well that it's
3 going to hit the ground, knowing full well that
4 they have a legal way of doing it on that pad and
5 choosing to go and do it illegally. And it was
6 just a matter of saving time, saving money.

7 They weren't relying on inspectors to put it on
8 that pile, coal pile. That had nothing to do with
9 it. They weren't relying on Miss Williams'
10 concepts of land based units that emerged in 2008.
11 That had nothing do with it. They weren't relying
12 on this was the first step of recycling, therefore
13 we don't need land disposal. No. They had a pad.
14 They knew how to do it. They chose to do it
15 differently. They chose to save money, save time,
16 just dump it on the pad. Just dump it off the pad
17 on the coal piles. Mix it directly there.

18 And the testimony shows there's no controls
19 when they did that, that the constituents can go
20 anywhere. And Mr. Snyder and Mr. Heukrath
21 testified that when it rained, whatever was on that
22 coal pile washed down into those ditches and
23 went -- left the coal piles and eventually made its
24 way through ditches down to the Niagara River.

25 Does that sound like land disposal to you,

1 where a constituent may enter the environment?
2 Doesn't even have to "shall enter the environment".
3 May enter the environment.

4 Then this argument about where does the ground
5 start. Apparently if you went home and sprayed --
6 and put coal on your lawn and you walked on it, you
7 weren't walking on the ground now, you're walking
8 on coal. Well, if we follow that, if you put grass
9 seed on the ground and you walk on the ground,
10 you're not walking on the ground, you're walking on
11 grass seed. Does that make any sense to you?
12 Where does the ground start? According to the
13 defense it's 3 feet below the surface, then
14 mentioned some sort of clay lens that went 50 feet.
15 Does that count or doesn't it count? Does it go
16 further down? Are we talking about the ground
17 starting about 53 feet below the surface of the
18 earth? Does that make any sense to you? The coal
19 was on the ground, and you're walking on it, that's
20 the ground. The same way if you're walking on the
21 sand, the sand is the ground. There's no
22 distinction between them.

23 And really the point is out of all of that, if
24 you put it on the ground in that fashion, if you
25 put it on the pile on a coal field, are you

1 containing it? Are you preventing the constituents
2 from migrating out into the environment? And the
3 answer is they didn't. By doing that, they
4 knowingly disposed of hazardous waste.

5 Now I want to talk about active management kind
6 of quickly. Trying to make this as quick as I can.
7 With respect to Count 17 there is this testimony
8 from Mrs. Williams regarding the issue of active
9 management. There is the testimony from Mr. Flax
10 about active management. It's very simple. Just
11 listen to the definition of the Judge as to what
12 active management is, okay? And your recollection
13 counts, not mine.

14 But do you recall testimony of Mr. Rogers? He
15 stated that when he first got to that area it was
16 spread out over a 200-by-200 foot area, and it was
17 things getting stuck in this. Okay. And that over
18 time that material got mixed at least twice with
19 coke breeze and heavy equipment ran over it, and it
20 moved the entire material over to the area between
21 the two tanks, and moved it all the way over there,
22 and now had all this stuff on top of it, and then
23 was accidentally set on fire. And on top of that it
24 was material leaked out into it.

25 Now, I wonder if I could have Exhibit 125.02.

1 Make it 125.01. There we go. Okay.

2 So, this is the site before the fire -- or
3 after the fire. And this is what it looked like
4 then.

5 Can we go to 3.04? Okay.

6 There's the tank on the right. And if you can
7 see, it's leaking. It's coming out. It's being
8 added to the material. Oh, by the way -- can we
9 blow up this part right here? Notice this is the
10 stuff they said well, we're putting this stuff down
11 as road -- as part of the road, that it's
12 impermeable. It doesn't prevent the spread of
13 anything. Does that look impermeable to you?
14 There's things growing in it. The water percolates
15 down, and there's things growing in it. This is
16 not impervious pad. This is not coal, coke breeze
17 making it impossible for material to spread.

18 Can I have Exhibit 136.02? Okay.

19 So this is the final result of active
20 management or not active management. You can
21 decide if this material that started out in a
22 200-200-foot area somewhere beyond this photograph
23 and was pushed into this area and mixed and
24 contributed to by the stuff in the tanks. You can
25 decide that for yourselves. Was this material --

1 when it was originally placed in that 200-and-
2 200-foot area, was that material disturbed? You
3 can decide that. And you don't need any experts to
4 figure that one out.

5 I just want to comment about something. If you
6 notice, there is a partial wall there left from the
7 storage tank.

8 And can we go back to 125.03 please? Make that
9 125.02. Sorry.

10 There are those tanks, the same tanks back
11 here, okay? And then after the fire if you recall
12 there was testimony that material leaked.

13 Can I put that 125.02 again? Sorry.

14 After the fire they said they walked around,
15 and if you see, you can see that there's water
16 there, so they really can't tell from that picture
17 if anything leaked or not if it had come out
18 underneath. And remember those tanks in the back.

19 Now, can I have Exhibit 3.06?

20 Remember this photograph? Mr. Corbett
21 testified that this material that looked like it
22 was solid was really like quicksand, that the
23 material had leaked out, and it leaked out all the
24 way over to those two tanks in the background.

25 Let's see if I can find -- 125.04 again. No,

1 I'm sorry. 125.02. There we go.

2 There are the other two towers. So that
3 material leaked from behind and out that way.

4 THE COURT: This is 125.01.

5 MR. PIAGGIONE: Thank you for that
6 correction, your Honor. And if I could go to
7 136.06, please.

8 Remember there was a partial wall? Well,
9 that's where they took the samples of this material
10 as it leaked. There was a trail that went from
11 there to those two tanks in the back. It leaked.
12 There's evidence it leaked.

13 Now, lets talk about the west tower, the west
14 quench tower. Now the defense tries to make this
15 controversy over the west quench tower. They say
16 that because the EPA and the DEC differed over the
17 baffles in the west tower going forward in November
18 of 2009 forward.

19 Is that another call coming in, your Honor?

20 THE COURT: It was. Sorry.

21 MR. PIAGGIONE: Because the EPA and DEC
22 got into a controversy over how they should have
23 baffles going forward from November 2009, somehow
24 someway that means the defendants can't be
25 prosecuted for not having baffles in the tower

1 before 2009. Before November of 2009. In other
2 words, if the defendants used it more than
3 10 percent of the time before 2009, they are
4 innocent, or being dealt with unfairly, because
5 once they found out they were using it, once they
6 found they were using it more ten percent, and once
7 it was determined they needed baffles in that
8 tower, going forward they were innocent for having
9 violated their exemption looking backward. That
10 makes no sense.

11 The government from its opening statement said
12 if the defendants were using the west quench tower
13 more than 10 percent of the time, it needed
14 baffles. So what does it matter if after November
15 of 2009, after the period that's charged in the
16 indictment, the EPA and the DEC decide they have to
17 have baffles in the tower? If they wanted to fight
18 that, they can go and fight that with the EPA and
19 DEC. It has nothing to do with this case. It's
20 irrelevant.

21 And with respect to how often it was used, do
22 you remember the testimony of the employees and the
23 ex-employees were, when they were working -- when
24 they first started working there, and it was more
25 than just Mr. Hoffmann, it was Mr. Gonzalez, it was

1 Mr. Kambat, people who said their work depended
2 upon which tower was being used. They worked on
3 the wharf or they worked on the hot car for a
4 while, the towers were used alternatively.

5 Mr. Heukrath said he started in 1993 said the
6 towers were used alternatively.

7 In fact, in 2008 when the west quench tower
8 comes back online, Mr. Kamholz tells him the west
9 quench tower should be used 10 percent of the time.
10 That's the first time Mr. Heukrath even hears about
11 10 percent of the time. The first time.

12 So what happened before that? Think about it.
13 The evidence is people remember -- they didn't sit
14 there and count, this is true. But that's not how
15 people remember things like this. They remember
16 them by events. If I was drawing an analogy, if
17 you went out to eat at a restaurant with your
18 friends, and you came back and you felt that the
19 food was good but it was expensive. Several years
20 later you remember that the restaurant was
21 expensive. You're not going to remember what
22 exactly you paid for it, what was your bill. But
23 you're going to remember it was expensive.

24 Well, the same way all the testimony is
25 consistent, the towers were used alternatively.

1 Not 10 percent of the time, not rarely.
2 Alternatively. That's how they remember things.
3 You remember by events, impressions you get. And
4 clearly Mr. Gonzalez was the only one who said --
5 let me say Mr. Heukrath said when Kamholz told him
6 the towers should only be used 10 percent of the
7 time, he also said he wasn't even sure if that
8 instruction was followed thereafter. That was his
9 testimony. He did not know.

10 So if you think about Mr. Gonzalez, he was the
11 one who is still on the battery, still working
12 there, 19 years on the battery. And he said for
13 every eight ovens pushed, there has to be one or
14 two that go to the west quench tower. And we added
15 it up. 24 pushes that's -- 2.4 is 10 percent.
16 Minimum three went to the west quench tower. And
17 as high as six went to west quench tower. That's
18 still more than 10 percent.

19 Now there is this question about when the west
20 quench tower was down, and depending on who you
21 heard, it went from six months to two years. But
22 that's not five years. That's five counts here.
23 Mr. Heukrath pinpoints -- he's the only one
24 pinpoints the time that the tower was down to 2008.
25 You can decide based upon that information which

1 counts apply, which counts may not apply. That's a
2 question of fact for you. But the simple fact of
3 the matter is six months to two years doesn't equal
4 five years.

5 I want to talk about the obstruction charge
6 before I finish up. Now, first of all,
7 Mr. Personius again claims it was never clear what
8 Mr. Kamholz said to Mr. Cahill. But let's look at
9 these arguments in context. He keeps saying that
10 we should put it in entire context, and I agree we
11 should.

12 First of all, Mr. Kamholz receives a letter
13 from the EPA that there was an inspection coming.
14 He gets the letter, not Mr. Cahill. Mr. Kamholz is
15 responsible for environmental compliance, not
16 Mr. Cahill. Mr. Kamholz had the responsibility to
17 get a permit for the bleeder valve, not Mr. Cahill.
18 So when Mr. Kamholz took Cahill through the
19 by-products area looking for violations to clean
20 up -- it wasn't the other way around. It wasn't
21 Mr. Cahill. It was Mr. Kamholz pointing out to
22 Cahill you've got to do that, you've got to clean
23 up that. If Mr. Kamholz didn't think the bleeder
24 valve was an issue, didn't think it was a
25 violation, why say anything? If he thought that

1 was perfectly all right, that's not like clean up
2 that oil spill. It's, that's a problem. Don't
3 have that going off when they're here.

4 Now, Mr. Personius tries to claim well there's
5 four different versions of it. Don't have that
6 going off when they're here. Don't have that going
7 off. Don't go having that go off during the --
8 it's all basically the same thing, isn't it?
9 You're trying to recall verbatim what someone said
10 to you four years ago.

11 And consider Mr. Cahill's stress testifying
12 here at that time. He's testifying against his
13 life-long employer. Think about that. And if he
14 gets something a little off, maybe he would be a
15 little nervous about it.

16 But if Mr. Kamholz didn't think it was a
17 violation, why did he even point it out to
18 Mr. Cahill? Does that make any sense to you? Why
19 he would do that, unless he thought it was a
20 problem? And if Mr. Kamholz didn't think it was a
21 violation, why did he tell Miss Hamre and the other
22 inspectors that there was no bleeder valve in the
23 by-product area? And my recollection, and yours is
24 the one that counts, Mr. Personius has a different
25 version of this. Mr. Kamholz told the inspectors

1 when they first saw it going off, you'll have to
2 speak to the by-products manager. He didn't say
3 that's steam, that's a pressure relief valve. He
4 didn't say anything like that.

5 Miss Hamre's testimony, if you recall it, was
6 she was looking down, she saw a cloud, they turned
7 around, she pointed it out to Mr. Garing.
8 Mr. Garing asked Mr. Kamholz what is that. And he
9 says you'll have to talk to the by-products
10 manager. He didn't say that's steam. He didn't
11 say that's a pressure relief valve. He said you
12 have to go talk to Cahill. Pat Cahill.

13 Now, did he know what it was? We know from the
14 testimony that he did. We know that more than one
15 person spoke to him about the bleeder valve over
16 the years. We also know, although Mr. Cahill
17 doesn't remember him there that often, that
18 Mr. Rogers remembers that he was there frequently
19 in the by-products area. That was his testimony.

20 There was only one reason why Mr. Kamholz told
21 Cahill that can't happen. It was to hide it.
22 Don't let it be seen during the inspection. And
23 when he did that, he obstructed the EPA's
24 inspection attempt to find benzene sources coming
25 from Tonawanda Coke Corporation. And as Paul

1 Harvey said, that's the rest of that story.

2 Now, there's the testimony that Kamholz said he
3 didn't discuss it afterwards. And this is
4 something that Mr. Personius put forth as something
5 you should consider, the fact that he never
6 mentioned it again. Well, you can also consider it
7 that perhaps Mr. Kamholz was now trying to distance
8 himself from Pat Cahill, because Pat Cahill was the
9 by-products manager. And now we had a violation in
10 the by-products area that the EPA had discovered.

11 Remember Mr. Kamholz's response to the 114
12 questionnaire? He answered it about the pressure
13 relief valve saying based upon P. Cahill, that's
14 how he prefaced it. He was putting the blame on
15 Pat Cahill. Yet he admits -- Mr. Personius admits
16 that Pat Cahill never spoke to Mr. Kamholz about
17 the bleeder valve after it was discovered. So he
18 wasn't supplying that information in that
19 questionnaire. Yet Mr. Kamholz put it down,
20 according to -- or by P. Cahill, as if he was
21 relying upon Mr. Cahill for the answers that he put
22 down. The other part of that is so the DEC's
23 response was turn that pressure up so it doesn't go
24 off. Let's figure out what we've got here before
25 we do something.

1 And this other argument about Mr. Carlacci,
2 whether or not he had a mask on or not, what
3 Mr. Carlacci remembers is he put the mask to his
4 face when they were going past that area. That's
5 all he remembers. He wasn't saying that he was
6 carrying this gas mask around all the time or not.
7 He wasn't passing judgment on that. It was
8 interesting he brought it along with him since they
9 indicated they weren't going to the battery where
10 you need it. They were going to go look at the
11 by-products area where supposedly you don't need
12 it.

13 Now, there's some other things that we might
14 mention. The question about Mr. Kamholz saying
15 about beehives. What's the importance about
16 beehives? According to Mr. Personius, Mr. Brossack
17 also doesn't remember what he heard when he said
18 it, that we just had a beehive for 45 minutes, and
19 Mr. Kamholz responded beehives only last ten
20 minutes. Well, there is a reason for that.

21 If you look at the Title V permit condition 75D
22 it says when there is a beehive, it has to be
23 reported. You have to tell the DEC or the EPA. So
24 if they're going to tell the DEC or the EPA they
25 had a 45 minute beehive, that would be a violation.

1 So, yes, Mr. Brossack could not read
2 Mr. Kamholz's mind, but did he have to? Is that
3 what happens in the real world? If someone said to
4 you we just had a beehive for 45 minutes, and he
5 says beehives only last ten minutes, what is the
6 message you're getting? Use your common sense. He
7 doesn't have to read his mind. He doesn't have to
8 say to Mr. Kamholz oh, you mean I should only put
9 it in the book at ten minutes, is that what you're
10 saying, Mr. Kamholz? That's not how it works in
11 the real world. Everyone is talking in context of
12 their everyday life. And they're not going to
13 spell out everything that's said.

14 You know a trial is a search for the truth.
15 And it's been that way for over 200 years. Now you
16 saw all the government witnesses up here. They
17 were people who were nervous. Remember Mr. Rogers
18 had broken out in hives. Mr. Gonzalez when he
19 tried to drink water was like a human quench tower.
20 I mean, you have to consider it took a great deal
21 of courage for them to go forward and speak here.

22 And what did the defense do? They subjected
23 these witnesses to a barrage of relentless
24 questions, parsing words, tenses, designed to
25 confuse the witness. Is that really a search for

1 the truth? And how many of you would have made a
2 mistake if you were subject to that type of
3 cross-examination?

4 You might consider that that was not a search
5 for the truth, but a search to create mistakes that
6 they can now represent to you well, on cross so and
7 so said this, so and so said that. You heard each
8 witness. You heard their entire testimony. You
9 use your common sense, and you won't be fooled.

10 You know, Abraham Lincoln is in the news a lot
11 lately. There is a movie about him. Perhaps you
12 saw it. He had this famous saying, among many,
13 about fooling the people. And that saying has kind
14 have been narrowed down and changed over time. It
15 basically comes down to this almost oriental
16 saying. Fool me once, shame on you. Fool me
17 twice, shame on me.

18 The defendants managed to fool the DEC and the
19 system designed to protect the environment once.
20 The defendants should not be permitted to fool the
21 system designed to protect the environment again.
22 Accordingly, I ask you to live up to your
23 responsibility as jurors and find the defendants
24 guilty of the 19 counts in this indictment. Thank
25 you.

1 THE COURT: Okay, Mr. Piaggione, thank
2 you.

3 Okay, ladies and gentlemen, we're getting
4 closer and closer and closer to what you have to
5 do, and that is resolve the fact issues that you've
6 heard argument about over the course of the last
7 two days. Before we do that though we think you
8 should be fortified, and so we're going to break
9 for lunch, and we'll have you back here at 2:30
10 we'll start again, but that will be with my
11 instructions on the law to you. Okay. No more
12 arguments.

13 Once we complete my instructions to you -- it's
14 going to take some time, so whatever you eat make
15 sure that it's enlightening in terms of your
16 ability to spend some time with me. Make sure you
17 don't eat too heavy so you start dozing off. I
18 want you to stay alert as best you can. Because,
19 you know, and nobody's making light of anything
20 here. This is very serious business, so -- it is
21 important that you understand my charge as a
22 totality, of the instruction in the law to apply to
23 this case. Don't really talk about it. Keep, you
24 know, enjoy the time that you have to get lunch,
25 enjoy lunch, and we'll see you back here at 2:30.

1 Okay. Thank you very much. You've been terrific.
2 Appreciate it.

3 (Jury excused from the courtroom.)

4 THE COURT: Thank you. See you back here
5 at 2:30.

6 (Lunch recess was taken.)

7 (Jury not present in the courtroom.)

8 THE COURT: Okay. The attorneys and the
9 parties are back present. I am ready to begin.
10 I'll have the jury brought in in short order. What
11 I -- just for your information, two things. One, I
12 am going to start with charge number 35, which is
13 the indictment is not evidence. I may have
14 delivered that charge before, but I think -- I did
15 not?

16 MR. LINSIN: No. I thought my
17 recollection, your Honor, is you stopped just
18 before that, because it seemed to be a logical
19 place to begin with before you start reading the
20 charge.

21 THE COURT: So I will start with that.
22 And for your information, with respect to the
23 special verdict form, in my judgment, I'm going to
24 let the verdict form stand as prepared. I'm not
25 going to add the special verdict form component to

1 the verdict form itself for a number of reasons,
2 including the fact that I think the charge that I
3 will be giving with respect to entrapment by
4 estoppel is a strong charge. I think from the
5 jury's standpoint, as engaged as they are, it will
6 not lose its impact by virtue of the strength of
7 the charge. It's not going to be any more
8 important or less important than anything else in
9 the charge, but I think the jury will get it.

10 I think there are some issues with respect to
11 the extent or the appropriateness of the proof as
12 to each individual count such that including the
13 language on each verdict sheet that applies to each
14 count of the indictment might not be the
15 appropriate way to go. And, you know, I did raise
16 this matter sua sponte in a sense, although it
17 certainly differs from, you know, the case that I
18 reviewed. But, I think in the totality, it still
19 winds up as the fairest of approaches is to leave
20 this verdict form as a general verdict form and not
21 a special verdict form, and that will be my
22 decision on that. So I just wanted you to know
23 before I get into charging the jury.

24 MR. LINSIN: Your Honor, could I ask about
25 two issues then? We accept your ruling obviously.

1 But with respect to the unanimity instruction on
2 the issue of active management for Count 17, can I
3 inquire how the Court intends to address that
4 issue?

5 THE COURT: You mean in terms of asking
6 for a jury response with respect to active
7 management?

8 MR. LINSIN: A confirmation, your Honor,
9 that the jurors -- it is one thing to provide a
10 general unanimity requiring unanimity on every
11 element and on every count.

12 THE COURT: Yeah. I don't believe it's
13 necessary to do anything more than the elemental
14 approach that we're -- for that particular count.
15 And I think there is the prevailing presumption
16 that the jury will follow my instructions with
17 respect to unanimity, so I don't think there's
18 anything more that really has to be done.

19 MR. LINSIN: The second point I wanted to
20 inquire about, your Honor, in the draft
21 instructions -- draft charges that were circulated,
22 when you again reference the entrapment by estoppel
23 defense toward the end of your charge -- it would
24 be what was originally -- I don't know what the new
25 number is, but originally draft charge 66 there was

1 an indication in that draft charge that it was
2 applicable to Counts 17, 18 and 19. You referenced
3 the earlier detailed discussion of the defense and
4 simply remind the jury that it applies to these
5 remaining counts.

6 I guess my threshold question there is, does
7 the Court intend to retain that language in what at
8 least was draft charge 66? As I'm looking at that
9 original draft charge, it is at the end of the
10 second paragraph -- I'm sorry, the third paragraph
11 in that draft charge.

12 THE COURT: Okay. The charge that -- I
13 mean, it's still the same. It's draft -- or it's
14 still 66. I think it's going to be on page 102 I
15 think when we get this finalized. But the way I
16 have it prepared is that I will reference that.
17 Initially the instruction related to Counts 1
18 through 15, but I will reference the fact that to
19 be included will be Counts 17 through 19 as well.
20 So that will take care of all of the counts.

21 MR. LINSIN: All right. Thank you.

22 THE COURT: There's more embellishing
23 language that surrounds that, but I've broken it
24 down into two separate sections.

25 MR. LINSIN: All right.

1 MR. PERSONIUS: Judge, I don't -- and I'm
2 not complaining. I just want to make sure I
3 haven't missed something. I don't have a copy of
4 the current version of what's left of the charge.
5 Are we not supposed to have it?

6 THE COURT: No, you should have it.

7 MR. LINSIN: No, I don't have it either.

8 THE COURT: You don't? Okay.

9 LAW CLERK: They don't get it. I can make
10 copies of it.

11 THE COURT: It would helpful --

12 MR. LINSIN: It would be helpful to be
13 able to follow along and make sure, if we're going
14 to ask whether we object or not at the conclusion
15 whether it's faithful to the text we understand.

16 THE COURT: That's my fault. We did make
17 changes.

18 LAW CLERK: Your practice is counsel does
19 not get a copy of the final charge. I can do it if
20 you want me to do it.

21 THE COURT: We made the changes though.
22 You have the draft charge, right?

23 MR. LINSIN: We have the draft charge.
24 The Court had indicated yesterday that things were
25 going to be repaginated. There were additional

1 charges made. We got some of the draft charges at
2 the end of the day yesterday, but --

3 THE COURT: Okay. Well, yeah, we'll do
4 it. Let's get it prepared. It's my fault.

5 MR. PERSONIUS: That's all right, Judge.

6 THE COURT: Give my a couple of minutes.

7 MR. PERSONIUS: Sorry.

8 THE COURT: Thank you, your Honor.

9 MR. LINSIN: Thank you, your Honor.

10 THE COURT: Give me a couple of minutes
11 and we'll get that done.

12 (Short recess was taken.)

13 (Jury not present in the courtroom.)

14 THE COURT: Okay. We are reconvened.

15 There is a question with respect to an email
16 exchange?

17 MR. LINSIN: Your Honor, there is. And I
18 apologize to the Court for not more thoroughly
19 reviewing this. Mr. Mango is correct and I now
20 have in front of me a copy of an email that he sent
21 to the Court's law clerk at 6:38 p.m. last evening
22 regarding these definitions. I erroneously
23 presumed that Mr. Mango, pursuant to our discussion
24 yesterday, would have transmitted to the Court a
25 full text of the definitions that we discussed and

1 agreed upon yesterday.

2 I now realize in reviewing this that he has
3 edited these definitions. He has left out
4 significant portions that, in his judgment, he
5 deemed irrelevant. He has adopted another
6 regulation, and I'm not quite certain how.

7 I fault myself, your Honor, for not more
8 carefully looking at this. But I presumed,
9 mistakenly, that we would be dealing with, and I
10 think we need to be dealing with, an unedited,
11 unmassaged definition straight from the
12 regulations, and that's not what this email
13 transmitted.

14 THE COURT: And we just took what was
15 given to us and incorporated that into the charge.

16 MR. LINSIN: So I do apologize for not
17 observing this before, your Honor. I didn't think
18 it was going to be necessary.

19 MR. MANGO: Your Honor, if I could
20 respond. I did put -- I didn't change any of the
21 definitions. I left out parts that really have no
22 bearing. For example, in modification this (aq) in
23 6 NYCRR 200.1(aq) Modification is about 10, 12
24 different -- 12 lines. And I don't think there's
25 any real dispute between the parties that what I've

1 included is the only relevant portion in this case.

2 I could, if you want, I could go back and cut
3 and paste and send the Court the full definitions.
4 You could take a look at them and make that call.
5 I didn't think this was going to be an issue, your
6 Honor.

7 It was not my intention to, you know, try to
8 mislead defense counsel or the Court, and I
9 absolutely did not try to do that. I tried to keep
10 the definitions in a very simple and clear manner
11 so that you wouldn't have to read 12 lines of
12 irrelevant text for modification.

13 MR. LINSIN: Your Honor, again, I fault
14 myself for not being clearer on this when I first
15 walked in the courtroom today. I don't have my
16 file with me that has the actual text of these
17 definitions. I would -- before I could agree to
18 editing or deleting text that Mr. Mango is
19 representing is irrelevant, I would need, on behalf
20 of my client, to look at the actual text. I
21 confess I should have done it last evening, and I
22 just did not. I have a file back in my hotel room,
23 but I don't have it with me.

24 THE COURT: Okay.

25 MR. LINSIN: I apologize, your Honor.

1 THE COURT: Get the full text, please, of
2 the definitions.

3 MR. MANGO: I'll go email them to the
4 parties right now, your Honor.

5 MR. LINSIN: Thank you, your Honor.

6 THE COURT: And then --

7 MR. MANGO: That should take me 15
8 minutes.

9 THE COURT: You haven't seen the weather
10 conditions outside?

11 MR. MANGO: There is a computer on the
12 third floor, so I'm going to go use that. I have
13 it electronically, and I can submit it.

14 THE COURT: If would do that, please, that
15 would be helpful, and notify me when you're ready.

16 Chris, if you tell the jury it's going to be a
17 little while yet before we get started, please,
18 with apologies, okay?

19 Okay.

20 MR. MANGO: Thank you, your Honor.

21 MR. LINSIN: Thank you your Honor.

22 (Short recess was taken.)

23 (Jury not present in the courtroom.)

24 THE COURT: Okay. We are again
25 reassembled. The attorneys and parties are back

1 present. Where do we stand as far as definitions
2 are concerned?

3 MR. LINSIN: Your Honor, again I apologize
4 to the Court for bringing this up at this point,
5 but Mr. Mango has now sent, I believe, to the Court
6 and to the defense the full text of these
7 definitions, which is what we had understood was
8 going to be included and instructed on. We believe
9 for a number of reasons with respect to each of
10 these definitions -- some of them I should say were
11 complete in Mr. Mango's email, and obviously those
12 I believe should stand. But for the ones that were
13 not complete, we believe the complete text of the
14 definition as contained in the regulations should
15 be incorporated.

16 I understand that one or two of them are a bit
17 more lengthy, but that is -- we believe there's
18 important language in there. That's what we had
19 understood was going to be included, and we would
20 ask simply that the full text be included rather
21 than the abbreviated version that was circulated to
22 the Court and to the parties last night.

23 THE COURT: Okay. Do you -- have you
24 specifically identified which ones --

25 MR. LINSIN: Yes. Let me -- I apologize

1 for scrolling through as I'm talking, your Honor,
2 but the definition of "source" needs to be amended.
3 That is incomplete in the original email. The
4 definition of "point" we believe was complete as
5 transmitted last evening, and therefore we don't
6 think any change it necessary there.

7 THE COURT: What I have is "emission
8 point" right, not just "point"?

9 MR. LINSIN: I'm sorry, "emission point,"
10 yes.

11 THE COURT: Okay.

12 MR. LINSIN: And the definition that is
13 contained in the draft charge number 44, which your
14 clerk just passed out, we believe captures the
15 entire language of the regulations, so we are fine
16 with that. The term "construction", however, is
17 abbreviated in this draft version, and we believe
18 needs to be amended. The term "modification" is
19 substantially abbreviated, and we believe needs to
20 be amended, and the term "process" is correct and
21 complete.

22 THE COURT: Okay. So --

23 MR. LINSIN: So source, construction, and
24 modification.

25 THE COURT: Okay. All right. So just

1 going back to the email, okay, for a second, where
2 you have Mr. Mango addressing Andrew, the first
3 definition is "emission source". At the bottom of
4 the email. Are we together on that?

5 Mr. Linsin, do you have the email?

6 MR. LINSIN: The email that was just sent,
7 your Honor, is that the email --

8 THE COURT: No, the one from last night.

9 MR. LINSIN: The one from last evening.

10 THE COURT: Yes.

11 MR. LINSIN: The first definition on that
12 email is "emission source".

13 THE COURT: Then it has in paren small F.

14 MR. LINSIN: Yes.

15 THE COURT: Okay. Is that the full
16 definition?

17 MR. LINSIN: That is the full definition,
18 yes.

19 THE COURT: Okay. Likewise, for
20 "modification" it's on the next page of the email.
21 There's "modification" that follows in paren aq, do
22 you see that?

23 MR. LINSIN: We passed over
24 "construction", your Honor.

25 THE COURT: Well, okay. "Construction" is

1 nine, paren nine.

2 MR. LINSIN: Correct.

3 THE COURT: That's full definition?

4 MR. LINSIN: That's full definition, yes.

5 THE COURT: Okay. And then modification
6 is in paren aq.

7 MR. LINSIN: Correct.

8 THE COURT: Full definition all the why
9 through in paren number two?

10 MR. LINSIN: Yes, your Honor.

11 THE COURT: Okay. That's what you want
12 included?

13 MR. LINSIN: Yes.

14 THE COURT: Okay. Well, what I believe I
15 will do is just -- I mean, I'd like to get started,
16 so I'm going to read off of the email. In the
17 meantime Andrew will be adding those definitions to
18 charge number 44.

19 MR. LINSIN: All right. That's fine, your
20 Honor.

21 THE COURT: And then once he's integrated
22 all of that in, everything else will fall into
23 place. He'll bring that out for you to follow
24 along.

25 MR. LINSIN: Thank you very much, your

1 Honor.

2 THE COURT: Andrew, does that work?

3 LAW CLERK: Sure. Can I just ask you a
4 question?

5 (Discussion off the record.)

6 THE COURT: In the definitions there's --
7 well, let's work with "modification" just for the
8 moment. When you get to the paren numbers 1 and 2,
9 there's the pursuant to 40 CFR Part 52.21. Then
10 you drop down to 2, it's 40 CFR Part 52.21. Do you
11 want that you included in, the "pursuant to"
12 language? Because -- well, no, not because.

13 MR. LINSIN: Your Honor, I believe we
14 could safely end that at 1975.

15 THE COURT: Right. And then in 2, we
16 could end it after "issued," period, instead of
17 referencing under 40 CFR --

18 MR. LINSIN: Yes, I believe -- I am
19 comfortable with that too, your Honor.

20 THE COURT: Okay. And then I think that's
21 pretty much it. Okay.

22 Mr. Mango, that works?

23 MR. MANGO: Yes, your Honor. Yes,
24 whatever the Court wants to do or defense requests.
25 Again, I was not trying to do anything so --

1 LAW CLERK: Emission source sub F, the
2 third line has "as defined in Part 203 of this
3 title." Do you want to end it at contamination?

4 MR. MANGO: I think it's probably safe to
5 take that out as well. They've heard it. But I
6 defer to counsel.

7 MR. LINSIN: You know, it may be cleaner
8 to simply put a period after the words "cleaning
9 device". Because I think we would all agree that
10 the exception that is captured in that last clause
11 is not an issue here.

12 MR. MANGO: That's agreed, your Honor.

13 THE COURT: That's okay?

14 MR. MANGO: That's agreed.

15 THE COURT: Okay. Andrew, anything else?

16 LAW CLERK: That's it. I'll bring out
17 charges 1 through 43, and then I'll bring the rest.

18 THE COURT: Okay. You can follow along.
19 It will be a little disjointed, but I think it's --
20 I'm going to take my time. I'm hoping we can
21 finish up the charge this afternoon. But, I mean,
22 actually I can only go until about 5:30, so that's
23 why I want to get started. Okay.

24 All right, Andrew, whatever you have to do.

25 MR. LINSIN: The last sentence -- I'm

1 sorry, your Honor. The last sentence though after
2 that part we just redacted from "emission source"
3 the last sentence will be retained in that
4 definition, yes?

5 THE COURT: Yes, where a process through
6 the end?

7 MR. LINSIN: Exactly.

8 THE COURT: Okay. Yes.

9 MR. LINSIN: Thank you.

10 THE COURT: Okay. The other thing is
11 where we break down the counts in the charge, 1
12 through 5, 6 through 10, and then 11 through 15,
13 and 16, and then 17 through 19 I'm going to just
14 read a summary rather than each individual count
15 and let the jury know that they will be given the
16 indictment so that they can get into the specifics
17 of Count 1, Count 2, et cetera.

18 MR. LINSIN: We have no problem with that,
19 your Honor.

20 MR. PERSONIUS: Very acceptable.

21 THE COURT: By the time -- Mr. Mango?

22 MR. MANGO: That's fine.

23 THE COURT: Because by the time we'd get
24 through reading each one of the counts, the jury
25 would be spent I think. So, I think that's

1 probably a good way of proceeding. Okay.

2 All right. Chris, if you would bring the jury
3 out, please?

4 (Jury seated.)

5 THE COURT: I don't know how much
6 lengthier a lunch break we can give you, but I hope
7 you're ready. If you would sit down, please.
8 Thank you for coming back. As you can see, the
9 attorneys and the parties are back present.

10 And, again, I apologize for the delay, but it
11 sometimes take us a little bit of time to get ready
12 for you, and in the end it saves a lot of time.
13 So, you know, I'm going to work with you for the
14 next couple of hours, all right, I think. And if I
15 can do it a little quicker than that, I hope that
16 will work. But, you know, only time will tell.

17 And it's important, but remember what I said to
18 you at the outset that no part -- no any one part
19 of the instruction that I give to you is any more
20 or less important than any other part. So it's the
21 totality of what I will be telling you that
22 comprises the law, the total law, that applies to
23 this case, not any one part. But we're going to
24 talk in terms of grouping of counts of the
25 indictment. I think almost everything that you are

1 familiar with -- and a lot of this you will have
2 heard before, but it's our hope that it will
3 register with you in a way that will be
4 constructive and that will be helping you get to
5 resolving the fact issues in this case.

6 I'll proceed much like we did when I gave you
7 the preliminary charge the other day. To be honest
8 with you, I'm losing track of days. I don't think
9 it was -- was it yesterday?

10 MR. MANGO: Two days ago.

11 THE COURT: Two days ago. All right. We
12 already have a dispute. You have to resolve the
13 fact issue when you did get that charge from me,
14 among others. Okay.

15 Serious business, right? I mean, we can't
16 repeat that enough. So, I've given you the
17 preliminary instructions, and we're now going to
18 turn to the charges and a discussion of those
19 against the two defendants in this case as contained
20 in the indictment. And just so you know, we're
21 going give you the indictment itself, so you're
22 going to have that document to work with.

23 And I want to remind you in that regard that
24 that document is just a notice document. It's not
25 evidence, and what it does is describe the charges

1 that are made against the defendants. And when I
2 say that, what I mean is that it is an accusation
3 that each of the defendants committed what is
4 charged in the 19 counts of that particular
5 indictment.

6 But, as you know -- and you've heard many times
7 you are not to consider it as any evidence
8 whatsoever of the guilt of the defendants in this
9 case. And in reaching the determination of whether
10 the government has proved the defendants guilty
11 beyond a reasonable doubt, you may consider only
12 the evidence introduced or the lack of evidence.

13 Now let me group those charges for you.
14 Charges are counts, synonymous, right? One through
15 five of the indictment charge the defendants, both,
16 with violating the Clean Air Act by operating a
17 source of air pollution in violation of a permit
18 issued under Title V of the Clean Air Act by
19 emitting coke oven gas from an unpermitted emission
20 source. Okay. Those are the first five counts.

21 Now, when you get to the indictment you'll have
22 each count, and they'll read similarly, but you
23 have to look at it carefully in terms of the
24 content of each count. So I'm not going to read
25 all five counts at this point.

1 What I will do is then go to the next grouping
2 of charges or counts, and that is 6 through 10, and
3 that too charges crimes under the Clean Air Act.
4 And each of the defendants is charged with
5 violating the Clean Air Act by operating a source
6 of air pollution in violation of a permit issued
7 under Title V of the Clean Air Act by operating the
8 western quench towers -- that's quench tower number
9 1 -- without baffles. And then the indictment will
10 take you through Counts 6 through 10.

11 The next grouping is Counts 11 through 15 also
12 involving the Clean Air Act. And if you remember,
13 the last three counts deal with the RCRA statute.
14 But 11 through 15 charge the same defendants with
15 violating the Clean Air Act by operating a source
16 of air pollution in violation of a permit issued
17 under Title V of the Clean Air Act by operating the
18 eastern quench tower -- and as you know, the
19 eastern quench tower is number 2, at least that's
20 the proof that has been presented to you -- without
21 baffles. Okay. That's Counts 11 through 15.

22 Now, Count 16 is the count that you heard --
23 okay. We'll get to Count 16 down the road a little
24 bit. And then, you know, we're going to talk about
25 Counts 17 through 19 as well. But we're going stay

1 with the Clean Air Act at this point in time. I
2 think it will make more sense to you before we get
3 to the obstruction of justice count, and then we
4 get to the RCRA count.

5 So let me tell you about the Clean Air Act,
6 and, I mean, just so you know, under the law it's
7 42 United States Code, Section 7413(c)(1). But the
8 purpose of that statute is this: The Clean Air Act
9 and the regulations promulgated thereunder is a
10 comprehensive air pollution control statute that
11 reflects the congressional purpose -- the purpose
12 of Congress -- to protect and enhance the quality
13 of the nation's air resources. And that's the
14 charge of the prosecutors in this office to
15 accomplish the enforcement of the Clean Air Act
16 pursuant to the purpose of the statute.

17 Now, let's talk about elements, because you've
18 been, in a way, trained or at least exposed to the
19 terminology elements of each of the counts in the
20 indictment. And each has to be satisfied by the
21 government beyond a reasonable doubt. And if the
22 government fails with respect to any one, you
23 cannot convict. If it does prove each of those,
24 before we get to discuss any defenses, if the
25 government proves each essential element beyond a

1 reasonable doubt, you must convict.

2 So let's take a look at Counts 1 through 5
3 again in the indictment. Those are the Clean Air
4 Act counts. And here's what the essential elements
5 are, and I'm going to go through four with you with
6 respect to Count 5. First, that the government
7 [sic] was an owner or operator of a stationary
8 source of air pollutants; second, that the
9 stationary source of air pollutants was subject to
10 the Title V operating permits program; third, that
11 during the time periods alleged in the indictment,
12 the defendant operated or caused to be operated a
13 stationary source in violation of a Title V
14 operating permit requirement by emitting --
15 what? -- coke oven gas from a pressure relief valve
16 in the by-products department, an unpermitted
17 emission source, and then which was condition 4 of
18 the Tonawanda Coke Corporation's Title V permit;
19 and fourth, that the defendant acted knowingly.

20 So you're going to have those four elements to
21 look at. Now, follow along with me. I'm going to
22 get you -- I mean, you're going to get a copy of
23 this, okay? Elementally. So, pay close attention
24 to me. But we're going to minimize the danger of
25 your getting lost by giving you a copy that will

1 relate to the specific essential elements. But let
2 it sink it. Listen.

3 So we've got the fourth element that the
4 defendant acted knowingly. So those are the four
5 essential elements that the government must prove
6 beyond a reasonable doubt. That's for Counts 1
7 through 5.

8 Counts 6 through 10, same principle applies.
9 Each essential element must be proved beyond a
10 reasonable doubt, and we're going to go through
11 four again. First, that the defendant was an owner
12 or operator of a stationary source of air
13 pollutants. Same, right? Second, that the
14 stationary source of air pollutants was subject to
15 the Title V operating permits program. Same,
16 right? But you have to individually consider each
17 for each count and each group of counts. Third,
18 that during the time periods alleged in the
19 indictment, the defendant operated or caused to be
20 operated a stationary source in violation of a
21 Title V permit requirement by operating the western
22 quench tower. And this is where it starts to
23 differ from the other one, because in the first
24 five you're talking about the emitting of coke oven
25 gas. But here we're talking about operating the

1 western quench tower that was -- according to the
2 indictment -- and you've heard evidence quench
3 tower number 1 -- at the Tonawanda Coke Corporation
4 without -- what? -- and you've heard about this in
5 the evidence -- a baffle system installed in such
6 quench tower -- and the condition that applies
7 there is number 96 -- of the Tonawanda Coke
8 Corporation's Title V permit, and in noncompliance
9 with any applicable exemption. Okay. So that's
10 the third element. And fourth, that the defendant,
11 like with the first five, acted knowingly.

12 So, essentially everything lines up, but you're
13 going to have that third element. It's going to be
14 a little bit different, because it has to be
15 tailored to Counts 6 through 10.

16 Now, let's find out -- what do you think, how
17 many elements there might be for Counts 11 through
18 15, right? Now, we had one through four on all the
19 others. How about if we have one through four on
20 these counts? And that's the way it works out.
21 But you have to separately consider the groupings.
22 Okay.

23 But, first, that the defendant was an owner or
24 operator of a stationary source of air pollutants;
25 second, that the stationary source of air

1 pollutants was subject to the Title V operating
2 permits program. Same, all right? Let's look at
3 that third one again, because the fourth will be
4 the same that the defendant acted knowingly. The
5 third one with respect to Counts 11 through 15 --
6 and if you remember, we had quench tower 1 in the
7 last five counts. We have quench tower number 2
8 now in this second grouping in Counts 11 through
9 15. So that during the time periods alleged in the
10 indictment, the defendant operated or caused to be
11 operated a stationary source in violation of a
12 Title V permit requirement by operating the eastern
13 quench tower, which is number 2 according to the
14 indictment, and you've heard evidence about that,
15 at the Tonawanda Coke Corporation without --
16 what? -- a baffle system installed in such quench
17 tower. The condition here is not 96, like it was
18 in the prior counts, 6 through 10. But this is
19 condition number 97 of the Tonawanda Coke
20 Corporation's Title V permit. And then the
21 knowingly -- committed knowingly requirement. So
22 there you go. Okay.

23 If you look at it, common sense, experience,
24 intelligence, right? Methodically, you just take
25 it, look at it, address it.

1 Okay. Let's talk about owner or operator and
2 what that term means. Because remember everybody
3 told you I'm going to be giving you definitions.
4 But when you listen to them, in light of all of the
5 evidence that you've heard, it's really going to
6 gel, okay? It's going to be jelling', to quote a
7 commercial.

8 And the term "owner or operator" means any
9 person who owns, leases, operates, controls, or
10 supervisors a stationary source. Okay. Common
11 sense. But, again, you have to know the specific
12 definition to make it all feel right and be right.
13 All right.

14 Let's talk about -- you're saying, okay, what
15 does stationary source mean? Let's talk about
16 that. That's our next charge. The term
17 "stationary source" means, generally, any source of
18 air pollution except those emissions resulting
19 directly from an internal combustion engine for
20 transportation purposes or from non-road engines or
21 vehicles. A major stationary source means any
22 stationary source of air pollutants which directly
23 emits or has the potential to emit 100 tons per
24 year or more of any air pollutant.

25 The term "major source" under the Clean Air Act

1 includes a major stationary source that was just
2 defined.

3 Okay. Now, a stationary source is subject to
4 the Title V operating permits program if it is --
5 what? -- a major source. Once subject to the
6 Title V operating permit program, the stationary
7 source must have a permit issued by a permitting
8 authority. In New York, the permitting authority
9 under the Title V operating permit program is the
10 New York State Department of Environmental
11 Conservation, the DEC, which is authorized by the
12 EPA to carry out the Title V operating permit
13 program.

14 Okay. When we're talking stationary source, we
15 agree we're talking about the Tonawanda Coke
16 Corporation, right?

17 MR. LINSIN: We do not dispute that, your
18 Honor.

19 THE COURT: Yes, it's not disputed, right?

20 Just so you know so I can give you context for
21 that stationary source, all right? All right.
22 Let's talk about some of the terms that we've just
23 talked about that relate to Counts 1 through 5 of
24 the indictment, and they -- and which involve the
25 pressure relief valve. Okay.

1 Under Title 6 of the New York Codes, Rules and
2 Regulation Part 201-1.2, if an existing emission
3 source was subject to the permitting requirements
4 of Title 6 Part 201 of the New York Codes, Rules
5 and Regulations at the time of construction or
6 modification, and the owner and/or operator failed
7 to apply for a permit for such emission source,
8 then -- okay, and I'm going to give you some
9 definitions, okay? And we're going to talk about
10 owner and/or operator. And that means that the
11 owner and/or operator must apply for a permit for
12 such emission source or register the facility in
13 accordance with the provisions of this part.
14 That's what the owner/operator must apply for under
15 the definitions that are applicable here.

16 The emission source is as follows by way of
17 definition: Air contamination source or emission
18 source, any apparatus, contrivance, or machine
19 capable of causing emission of any air contaminant
20 to the outdoor atmosphere, including any
21 appertinent exhaust system, air cleaning -- or air
22 cleaning device. Where a process at an emission
23 unit uses more than one apparatus, contrivance, or
24 machine in combination, the combination may be
25 considered a single emission source. Okay. That's

1 what we're talking about when we say emission
2 source.

3 Emission point is defined as any conduit,
4 chimney, duct, vent, flue, stack, or opening of any
5 kind through which air contaminants are emitted to
6 the outdoor atmosphere. I'm going to give you
7 these definitions too. But stay with me, please.
8 Okay.

9 Now construction, that's a term that's defined
10 as follows: The initiation of physical on-the-site
11 construction activities which are of a permanent
12 nature, excluding site clearing and excavation.
13 Such activities include, but are not limited to,
14 installation of building supports and foundations,
15 laying underground pipework, and construction of
16 permanent storage structures.

17 That's one of the terms you will have defined
18 for you should you choose to address it and use it
19 properly. All right.

20 Now "modification" is another definition that
21 I'm going to give you, and it's a rather lengthy
22 definition, so I ask that you pay as close
23 attention to me as you can in that regard.

24 Modification, any physical change or change in
25 the method of operation of an incinerator,

1 stationary combustion installation, or process
2 which, one, increases the hourly emission rate,
3 emission concentration, or emission capacity of any
4 air contaminant; or two, involves the installation
5 or alteration of any air cleaning installation --
6 air cleaning device or controlled equipment; or
7 three, involves conversion of fuel used in any
8 emission source to a fuel with a higher ash content
9 than the fuel used prior to the change; or four,
10 involves the alteration of any furnace or other
11 physical changes to allow burning of refuse, or
12 refuse-derived fuel with fossil fuel; or five,
13 results in the emission of any air pollutant not
14 previously emitted or authorized under the permit.

15 Routine maintenance, repair, and replacement of
16 original equipment or parts thereof are not
17 considered physical changes. Any increase or
18 decrease in the hours of operation is not
19 considered a change in the method of operation if
20 the total emissions do not cause air pollution or
21 contravention of any applicable ambient air quality
22 standard, and the hours of operation are not
23 restricted through a condition of a permit or
24 certificate issued for the air contamination
25 source.

1 A physical change or a change in the method of
2 operation shall not include the use of an
3 alternative fuel or raw material which, one, the
4 facility or emission source was capable of
5 accommodating before January 6th, 1975, unless
6 change would be prohibited under any federally
7 enforceable permit condition, which was established
8 after January 6th, 1975; or two, the facility or
9 emission source is approved to use under any permit
10 that is issued.

11 Okay. That's the definition of modification.
12 I know there is a lot in there. Okay. But the
13 term may come up in your discussions, so you look
14 at the definitions, which will be a part of what I
15 give you, okay?

16 Now, "process" is the last definition for now
17 that I'm going to give you as it relates to the New
18 York State regulations. And process is defined as
19 any activity involving one or more emission sources
20 that emits or has the potential to emit any
21 regulated air pollutant. Okay.

22 Now, we're going to get down to the fourth
23 element that relates to that grouping of charges
24 and counts that we've talked about up to this point
25 in time. And I want to give you the definition of

1 "knowingly". All right. And an act is done
2 knowingly if the defendants are aware of the nature
3 of their acts and do not act or fail to act through
4 ignorance, mistake, or accident. You may consider
5 evidence of the defendants' words, acts or
6 omissions, along with all other evidence, in
7 deciding whether the defendants acted knowingly.
8 It is not necessary for the government to prove
9 that the defendants knew that they were acting in
10 violation of the law, or that they knew of any of
11 the regulatory requirements.

12 The crimes we're talking about here are general
13 intent crimes. That is, the defendants do not need
14 to know that they were violating the specific terms
15 of the permit or the law in order to be guilty of
16 the crime. You must, however, find that they knew
17 the facts of what they were doing.

18 For Counts 1 through 5, this means that you
19 must find that the defendants knew that coke oven
20 gas was being emitted from the pressure relief
21 valve in the by-product department. Then you must
22 find this emission was unpermitted and was in
23 violation of the Title V permit. Counts 1 through
24 5.

25 Count 6 through 10. This means that you must

1 find that the defendants knew that the western
2 quench tower, tower 1, was being operated without a
3 baffle system installed. For Counts 11 through 5
4 [sic], to establish that knowledge element, this
5 means that you must find that the defendants knew
6 that the western quench tower, tower number 2 --
7 I'm sorry, that the eastern quench tower, tower
8 number 2, was being operated without a baffle
9 system installed. Okay.

10 Now, remember, we've gone through the elements
11 for 15 counts. Right? Okay. Now, you've heard
12 the argument about the entrapment by the estoppel
13 defense. Let me tell you about that now.

14 The entrapment by estoppel defense is available
15 to the defendants who can establish by a different
16 proof standard, a preponderance of the evidence --
17 they have to prove it -- but by a preponderance of
18 the evidence that the government procured their
19 commission of the illegal acts by leading them
20 to -- what? -- reasonably believed that they were
21 authorized to commit them. It is a defense to the
22 Clean Air Act violations, Counts 1 through 15, that
23 I have just discussed with you. That's a
24 recognized legal defense. Okay.

25 The entrapment by estoppel defense does not

1 negate any of the statutory elements of a crime.
2 Rather, the entrapment by estoppel defense
3 recognizes that even though the government may have
4 proved all of the elements of the crime to convict
5 the defendant for the acts committed in reasonable
6 reliance on a government official's statements, or
7 on the conduct of the government would -- what? --
8 have violated due process or, what you heard argue
9 to you, fundamental fairness. Okay. That's how
10 that defense comes into play.

11 To establish this defense, the defendants must
12 show that they reasonably relied on the statement
13 or conduct of a government official when they
14 engaged in the conduct with which they are charged.
15 Reliance is reasonable if a person sincerely
16 desirous of obeying the law, would have accepted
17 the statement or conduct of the government official
18 as true and would not have been put on notice to
19 make further inquiries of his or her own.

20 The defendants must also show that they
21 reasonably disclosed the conduct alleged in the
22 indictment to the government before or at the time
23 of authorization. That is -- here's what you must
24 find as a jury -- a connection between the conduct
25 disclosed by the defendants, and the conduct that

1 the government purportedly authorized. There has
2 to be that connection.

3 And finally, the government -- the defendants
4 need not establish that the government actually
5 authorized their conduct. They don't have to show
6 that. They must only establish -- what? -- seeming
7 authorization. Seeming authorization. Actual
8 authorization is not required.

9 But remember this, the defendants have the
10 burden to prove the entrapment by estoppel defense
11 by preponderance of the evidence, which is more
12 than equal evidence. It's not proof beyond a
13 reasonable doubt.

14 Lets talk about what that preponderance of the
15 evidence really means by way of strict definition.

16 I just told you that the defendants have the
17 burden of proofing the estoppel -- the entrapment
18 by estoppel defense -- by what? -- a preponderance
19 of the evidence standard, right?

20 To prove something by a preponderance of the
21 evidence means to prove only that it is more likely
22 than not true. It is determined by considering all
23 of the evidence and deciding which evidence is more
24 convincing.

25 In determining whether defendants have proven

1 this defense, you may consider the relevant
2 evidence or the relevant testimony of all of the
3 witnesses, regardless of who may have called them,
4 and all of the relevant exhibits regardless of who
5 may have produced them. If the evidence appears to
6 be equally balanced, or you cannot say upon which
7 side it weights heavier, you must resolve, on this
8 issue, the question against the defendants. Okay.
9 Because it's got to be more than equal evidence.

10 However, it is important to remember the fact
11 that the defendants have raised this defense does
12 not relieve the government of the burden of proving
13 all of the elements of the crimes that we just
14 talked about in Counts 1 through 15. These are
15 things that the government must still prove beyond
16 a reasonable doubt. In order words, they have to
17 prove all the essential elements beyond a
18 reasonable doubt. Okay. That's Counts 1 through
19 15.

20 We'll break it up before we get to those 17 to
21 19 counts, which is the RCRA counts. Lets talk
22 about obstruction of justice, okay? And that's the
23 one count that kind of breaks synch here, if you
24 will. And the defendants have been charged in this
25 Count 16 with obstructing and endeavoring to

1 obstruct the due administration of proceedings
2 pending before the United States Environmental
3 Protection Agency. Once again, Count 16 will be
4 given to you so that you can read through it. But,
5 you know, those terms, obstruction of justice, even
6 by their common meaning, defines what Count 16 is.
7 And when you look to Count 16 though you'll get all
8 the specifics in terms of the dates and all of the
9 particular language. And, you know, the particular
10 statute in this case -- as you recall, I gave you
11 some statutory references earlier on the other
12 counts that had to do with the Clean Air Act.

13 Title 18 is basically the criminal code, and
14 there's a section of that, 1505, which is the
15 obstruction of justice statute. And the law reads
16 this way: Whoever corruptly or by threats of
17 force, or by threatening letter of communication
18 influence, obstructs, or impedes, or endeavors to
19 influence, obstruct or impede the due and proper
20 administration of law under which any pending
21 proceeding is being held before any department or
22 agency of the United States, shall be guilty of a
23 crime.

24 And you heard the argument with respect to
25 obstruction of justice. But that's the technical

1 language of the statute, and I'll give you that
2 too. So if you want to look at that particular
3 law, you can, and you should if you believe that
4 would be helpful. Take that Count 16 and look at
5 it, read it through, and you'll get the specifics
6 that you need for purposes of what you have to
7 decide here.

8 Now, the law is designed to prevent any
9 endeavor -- this is charge number 49 -- whether
10 successful or not, which is made for the purpose of
11 corruptly influencing, obstructing or impeding an
12 agency proceeding. The word "proceeding"
13 encompasses all the steps and stages of the
14 performance by an agency of its governmental
15 functions. It extends to and includes both
16 investigative as well as administrative functions.

17 The sweep of the statute extends to any corrupt
18 endeavor or effort to obstruct -- what? -- the due
19 administration of the law under which a proceeding
20 is being conducted.

21 All right. So, now is there a key word in this
22 statute? Yes, and that's endeavor. As used in the
23 statute, endeavor means any effort or any act,
24 however contrived, to obstruct or interfere with
25 the proceeding. It is the endeavor which is the

1 gist of the crime. Success of the endeavor is not
2 an element of the crime. The word "corruptly"
3 means having the improper motive or purpose of
4 obstructing the proceeding.

5 Okay. Let's -- that's, you know, we're really
6 talking the definition, right? Now we've got to
7 go -- just like we do with those 15 counts, we need
8 to look at these things elementally, right? Now we
9 have to find out how many essential elements there
10 are that the government must prove beyond a
11 reasonable doubt. This case three, not four. But
12 you have to consider each one, right?

13 In order to establish whether the defendants
14 are guilty of the charge in the indictment, the
15 government must prove first, that on or about the
16 date set forth in the indictment a proceeding was
17 pending before an agency of the United States.
18 Proceeding was pending before an agency of the
19 United States. Second, that the defendants --
20 what? -- knew that a proceeding was pending before
21 an agency of the United States. And three, that
22 the defendants -- now listen to these words --
23 corruptly endeavored -- remember endeavor --
24 corruptly endeavored to influence, obstruct, or
25 impede the due and proper administration of the law

1 under which the proceeding was being conducted.

2 Okay. Lets break that down further. And it's
3 important. I know this is a lot, okay? But just
4 stay with me, because we're going to talk about
5 those elements and some of the other terms like
6 what does "proceeding pending" mean, just so that
7 there's -- we kind of minimize the prospects for
8 your making any mistake if you reference what I'm
9 going to be giving you and what I'm trying to kind
10 of drum into you right now.

11 The first element that the government must
12 prove beyond a reasonable doubt is that on or about
13 the date set forth in the indictment a proceeding
14 was pending before an agency of the United States.
15 In that regard you are instructed that the United
16 States Environmental Protection Agency, the EPA, is
17 an agency of the United States, and further that a
18 proceeding includes an inspection by this agency at
19 the Tonawanda Coke Corporation facility. Okay.

20 Now, the second of the three elements you have
21 to look to to see if the government as proven it
22 beyond a reasonable doubt is that the government
23 must prove beyond a reasonable doubt that the
24 defendants knew that the administrative proceeding
25 was in progress, and you've heard argument about

1 this. In order to satisfy this element, you need
2 only determine that the defendants knew at or about
3 the date charged that the United States
4 Environmental Protection Agency was conducting an
5 inspection at the Tonawanda Coke Corporation
6 facility.

7 And the third and final element before we get
8 to move on, right, because we have Counts 17, 18,
9 and 19, RCRA counts. So it's arranged in a way
10 where it's methodical if you break them down and
11 you group them, and then you look at the elements
12 which will correspond if you look at the four
13 essential elements.

14 Now that we're here, we're going to the third
15 and final element of this obstruction count. The
16 others ones had four. This has three essential
17 elements. So the government must prove beyond a
18 reasonable doubt that the defendants did corruptly
19 obstruct or impede, or endeavor to obstruct or
20 impede the proceeding before the Environmental
21 Protection Agency, the EPA.

22 Now, as I explained earlier, the word
23 "corruptly" means simply having the improper motive
24 or purpose of obstructing justice. So, as I told
25 you, success of the endeavor is not an element of

1 the crime. All right. Whether they succeeded
2 that's not an element of the crime. The term
3 "endeavor" is designed to reach all conduct which
4 is aimed at influencing, intimidating, and impeding
5 the proceedings. Thus, it is sufficient to satisfy
6 this element if you find that the defendants made
7 any effort or did any act for the purpose of
8 obstructing or impeding the proceeding, right?

9 Common sense, experience, intelligence. I know
10 there's a lot. But you break it down, you take
11 these terms, you apply them, you look at the
12 indictment, you call to mind the arguments, not as
13 evidence, then remember the evidence, start
14 plugging it in, discussing it, work through it
15 methodically. Don't just get overwhelmed by it. I
16 know you can do it. Common sense, experience,
17 intelligence. Come back with the unanimous
18 verdict, okay? That's the way we do it. Just take
19 it calmly, listen to each other, respect each
20 other's views and work through it.

21 Okay. Now, I know you're waiting, because
22 we're going to talk about Count 17, 18 and 19 now.
23 These are the RCRA counts that we built the
24 anticipation up to, right? But, again, in the
25 indictment no charge is more important than the

1 other, right? You've got to approach them
2 methodically. The different one we just got
3 through, that was the obstruction. Now we're going
4 to be in those RCRA counts.

5 And let's talk about that, because in these
6 counts we're talking about violations, not of the
7 Clean Air Act, not of the Title 18 obstruction of
8 justice statute, but we're talking about the
9 Resource Conservation and Recovery Act, right,
10 RCRA. And that statutory references this Title 42
11 U.S.C. Section 6928(d)(2)(A). You probably never
12 knew there was so many numbers and letters and
13 parentheses, right, that's associated with the law,
14 but there are. And, you know, they're important
15 for charging because, you know, when you get to
16 those right sections and subsections and titles,
17 that's what leads you to the essential elements
18 that are at issue in the case, which the government
19 says it -- and acknowledges it must prove beyond a
20 reasonable doubt. And the defense is saying, hey,
21 wait a minute, the proof doesn't measure up. And
22 if we didn't get to the right subsections and
23 sections and titles, you'd be all over the lot. So
24 this is going to keep you focused.

25 Count 17 of the indictment charges that the

1 defendants -- or charges the defendants with the
2 storage of a hazardous waste on the ground adjacent
3 to the two large deteriorating tanks at the
4 Tonawanda Coke Corporation without a permit. Okay.

5 Count 18 of the indictment charges the
6 defendants with a disposal of a hazardous waste
7 originating from in and around two large
8 deteriorating tanks at the Tonawanda Coke
9 Corporation without a permit.

10 And Count 19 of the indictment charges the
11 defendants with the disposal of a hazardous waste
12 by spreading the waste on to the coalfield at
13 Tonawanda Coke Corporation without a permit.

14 So you've got to watch the nuances here. But
15 when you read the text of the charge, the
16 indictment, it will come back. It will give you
17 the picture that you've heard the argument about,
18 that you've heard all the proof that's been
19 introduced in this -- in this trial. Okay.

20 I referenced the statute for you that applies
21 to Counts 17, 18, and 19, to read it in text and as
22 it appears in the book, reads this way: Any person
23 who knowingly treats, stores, or disposes of any
24 hazardous waste identified or listed under this
25 subchapter without a permit under this subchapter

1 violates the law. Okay. Basically.

2 Now, let's talk, like we did before, what's the
3 purpose of this law, of RCRA? All right. The RCRA
4 law established a system for managing nonhazardous
5 and hazardous solid wastes in an environmentally
6 sound manner.

7 All right. That's what we're talking about.
8 When we talk about clean air, we talk about RCRA,
9 RCRA's environmental. You've learned that. That's
10 what this law is about.

11 And the RCRA law established a system, again,
12 for managing these nonhazardous and hazardous solid
13 wastes in an environmentally sound manner.
14 Specifically, RCRA provides for the management of
15 hazardous wastes from the point of origin to the
16 point of final disposal, and promotes resource
17 conservation, recycling, and waste minimization.

18 RCRA's hazardous waste implementing regulations
19 for K087 first went into effect in November 1980.
20 And regulations covering wastes that were
21 characteristically hazardous for benzene first
22 became effective in September of 1990.

23 So we're talking about, you know, basically a
24 ten-year period of time for those two laws. Okay.

25 Now, we're going to talk to you about active

1 management. The attorneys have mentioned, well,
2 look, the judge is going to give you an instruction
3 on what constitutes active management. That's what
4 I'm going to do now. And you've heard the proof
5 relative to was something active management or not.
6 That's a fact issue, right? So you have to decide
7 with respect to the management of waste under RCRA.

8 Now, my instruction to you is here is the
9 definition of active management. And you're going
10 to get this. But if you hear it from me, I hope
11 some of it sticks, okay, and then refer to this.
12 You know, be guided by it. Take your time, work
13 through it.

14 Active management means physically disturbing
15 accumulated waste within a management unit, or
16 disposing of additional hazardous wastes in
17 existing units containing previously disposed
18 wastes. Okay. In other words, it means taking
19 some action to disturb or disrupt contained
20 hazardous waste, or adding hazardous waste to
21 previously contained materials. And if active
22 management occurs after November 19th, 1980, it is
23 subject to regulation under RCRA. Okay. Active
24 management.

25 All right. Let's talk about the elements just

1 like we did with the other 16 counts. All right.
2 With respect to Count 17, in this case you have
3 five elements that you have to look at. All right.
4 Five essential elements that the government must
5 prove beyond a reasonable doubt. First, that the
6 defendant -- and you have two defendants. You have
7 to analyze both, right, separately -- actively
8 managed a waste after December 25th, 1990. All
9 right. Second, that the defendant knowingly stored
10 or caused others to store a waste on or about the
11 dates set forth in the indictment. So you've got
12 to look at the indictment to get those dates.
13 Third, that the waste was hazardous as defined by
14 RCRA. Fourth, that the defendant knew that the
15 hazardous waste had the potential to harm others or
16 the environment. In other words, knew that the
17 waste was not a harmless substance, like, for
18 example, uncontaminated water just as an example.
19 Okay. And fifth -- this is where we go now to five
20 elements on this thing -- that the defendant did
21 not have a permit to store the hazardous waste.

22 So you can tell you've got some work to do,
23 because you've got to take everything that you
24 learned in this case and relate it to each of the
25 individual elements, because they're all essential.

1 In this case five for these three last counts.

2 Okay. Well, there will be four in the
3 Counts 18 and 19, five for Count 17. All right.

4 Let's talk about 18 and 19. First, that the
5 defendant knowingly disposed or caused others to
6 dispose a waste on or about the date set forth in
7 the indictment. So you go to the indictment. You
8 look at it. What are the dates? Eighteen and 19.
9 Second, that the waste was hazardous as defined by
10 RCRA. Third, that the defendant knew that the
11 hazardous waste and the potential to harm others or
12 the environment. In other words, knew that the
13 waste was not a harmless substance, once again,
14 like uncontaminated water. And fourth, that the
15 defendant did not have a permit to dispose of the
16 hazardous waste. All right.

17 Let's talk about the term "storage". Because
18 under RCRA, it means the containment of -- when we
19 talk about the containment of hazardous waste
20 either on a temporary basis or for a period years.
21 Now we're talking about storage. The term
22 "storage" is defined under RCRA as the containment
23 of hazardous waste either on a temporary basis or
24 for a period of years in such manner as not to
25 constitute disposal of such hazardous waste. Waste

1 that have already been disposed of cannot be
2 considered to be in storage.

3 The term "disposal" then is defined under RCRA
4 as the discharge, deposit, injection, dumping,
5 spilling, leaking, or placing of any solid waste or
6 hazardous waste into or on any land or water so
7 that such solid waste or hazardous waste or any
8 constituent thereof may enter the environment or be
9 permitted into the air or discharged into any
10 waters, including ground waters.

11 Now, the government has to prove that the
12 materials referenced in the indictment were
13 hazardous waste. But before you may conclude that
14 the materials were hazardous wastes, the government
15 must prove to your satisfaction that the materials
16 were solid waste.

17 So the first issue when you approach this to
18 get it into manageable order, the first issue for
19 you to decide is whether the materials were solid
20 wastes. And a solid waste is defined as garbage,
21 refuse, or any other discarded material included
22 solid, liquid, or semi-solid material resulting
23 from industrial or commercial operations. A
24 material is considered discarded if it falls into
25 any of the following four categories.

1 You've heard these terms for the most part
2 before in the evidence. It is abandoned by being
3 disposed of it; it is accumulated, stored, or
4 treated before or in lieu of being disposed of;
5 third, it is recycled by being reclaimed, burned
6 for energy, recovery, or used in a manner
7 constituting disposal; or four, it is accumulated,
8 stored, or treated before it is recycled by being
9 reclaimed, burned for energy recovery, or used in a
10 manner constituting disposal.

11 Okay. You know, I know, again, it's a lot.
12 But, you know, these terms -- I suspect they're
13 really beginning to stick, right? And when you use
14 the text here to guide you, all right, and, you
15 know, you'll eliminate any doubts in terms of the
16 strict definition of the terms, and then you just
17 have to apply it to what you all collectively know
18 the evidence to be in this case so you can resolve
19 those fact issues. That's how you have to prove
20 it.

21 It's not going to be an all -- undoable. It's
22 doable because -- but you need to take the time,
23 put in the effort. Because like anything
24 worthwhile, you really have to make application to
25 get it done and get it done unanimously. Okay.

1 MR. LINSIN: May we approach just for a
2 brief --

3 THE COURT: Yes. certainly.

4 (Side bar discussion held on the record.)

5 MR. LINSIN: I apologize, your Honor. I
6 thought we had addressed this. I was -- I wanted
7 to raise a point regarding the next charge.

8 THE COURT: K087 charge?

9 MR. LINSIN: It's 62, yes.

10 THE COURT: Okay.

11 MR. LINSIN: This exception that is
12 discussed in this charge relates both to K087 and
13 the D018 material. That exemption applies to both,
14 and I thought it was something -- I apologize, I
15 thought it was something we had discussed. And I
16 was just concerned to raise this with the Court
17 before reading this. It appears to focus it only
18 on Count 19. It really, in our view and I believe
19 the government agrees, applies to both counts, 18
20 and 19. The same language, but applies to both
21 counts.

22 THE COURT: I know we talked about that,
23 and I didn't catch that. But if I just reference
24 this for purposes both Counts 18 and 19, and then
25 I'll make a change in the charge.

1 MR. LINSIN: And to the extent you are
2 referencing the type of waste, if you could
3 reference the D018 as well as the K087. Thank you,
4 your Honor.

5 THE COURT: Okay. Okay. No problem with
6 that?

7 MR. MANGO: No, your Honor. The D018 has
8 to be that type of waste from the coking process,
9 and I don't think there's any dispute that that
10 D018 is from a coking process. Obviously there is
11 a lot of ways something can become toxic for
12 benzene. But I think we all agree this is a D018
13 from a coke process, since it's been a coke plant
14 for about a hundred years.

15 THE COURT: Okay. I'll kind of present it
16 that way. All right. Thank you.

17 (End of side bar discussion.)

18 THE COURT: How are you doing so far?

19 A JUROR: Great.

20 THE COURT: All right. Good. And, you
21 know, we really do appreciate it. I know I watch
22 you, sometimes even through the corner of my eye
23 just to make sure we keep you in line. But I know
24 sometimes you want to say, boy, can I deal with all
25 of that? And, you know, I guess if I were in your

1 shoes I'd feel the same way. But, you know, the
2 more I talk about it, the more we go through this,
3 it really is doable. And you have to commit
4 yourself to what you took the oath to do, and that
5 is to really gather yourselves up and make that --
6 that exceptional effort to get a handle on
7 something. When you started out just 30 days
8 ago -- I mean, it seems like we've known each other
9 for our entire lives, right? And it's like you
10 kind of pray for a split in the family, I guess, so
11 you don't get to see anybody the next day.

12 But, you know, and as I started out with you, I
13 mean, I didn't know what the evidence was. But,
14 you know, K087, D018, I mean, those are household
15 terms now, right, that you shouldn't have been
16 discussing with anybody, but I know in your mind
17 they're there, right? And you'll never forget
18 those numbers. And, frankly, if the Lotto didn't
19 turn out the way it was, I think those are key
20 numbers. And you might want to keep that in mind
21 for when you continue to play.

22 But getting back to this, let me talk to you in
23 terms of those numbers and Counts 18 and 19, okay?
24 And those are the last two counts. And this
25 charge, this instruction, references both K087 and

1 D018.

2 And for purposes of both Counts 18 and 19, the
3 waste alleged to have been disposed of in those
4 counts is identified in the indictment as decanter
5 tank tar sludge from coking operations, that's what
6 we're talking about, K087. And D018 is waste from
7 the coking process. Did we need to further
8 identify it?

9 MR. MANGO: Just that have the toxicity
10 characteristic for benzene.

11 MR. LINSIN: Yes, I agree, your Honor.

12 THE COURT: Okay. So K087, D018 -- I'll
13 just write -- okay. So, under RCRA, both K087 and
14 D018 are excluded from the definitions of solid
15 waste if the K087 and D018 waste are recycled to
16 the coke ovens. However, the exclusion is
17 conditioned on there being no land disposal of
18 either of the wastes from the point they are
19 generated to the point where they are recycled to
20 coke ovens.

21 The term "land disposal" means the discharge,
22 deposit, injection, dumping, spilling, leaking, or
23 placing of any solid waste or hazardous waste into
24 or on any land so that such solid waste or
25 hazardous waste or any constituent thereof may

1 enter the environment or be emitted into the air or
2 discharged into any waters, including groundwaters.

3 If you find that there has not been land
4 disposal of the K087 or K019 [sic] then the
5 exclusion applies, and you cannot consider either
6 as a solid waste. But if you find that there has
7 been land disposal of one or both, then the
8 exclusion does not apply, and you must consider the
9 K087, D018 as a solid waste. Yes? Okay.

10 Lets define hazardous waste lest there be
11 confusion. The term "hazardous waste" as used in
12 RCRA means a solid waste -- all right -- that has
13 been identified or listed as hazardous by the EPA
14 and New York State. A solid waste is a hazardous
15 waste if it is either a characteristic hazardous
16 waste or a listed hazardous waste under EPA and New
17 York regulations. And you've heard that
18 terminology before, right? You never knew that
19 you'd hear that thing so many times. But you have.

20 Characteristic hazardous wastes are wastes that
21 are hazardous because they exhibit one or more of
22 the hazardous characteristics identified in the
23 regulations such as toxicity. Toxic hazardous
24 wastes are wastes containing levels of certain
25 contaminants such as benzene. If the contaminants

1 are present in excess of the limits listed when
2 tested using appropriate test measures, the waste
3 is regulated as a toxic hazardous waste. The EPA
4 and New York State have set the regulatory limit
5 for benzene at 0.5 milligrams per liter.

6 Now, with respect to these charges, the
7 government must prove that the defendants acted
8 knowingly. An act is done knowingly if the
9 defendants realized what they were doing and did
10 not act through ignorance, mistake, or accident.
11 This is going to sound familiar to you.

12 You may consider evidence of the defendant's
13 acts and words along with all of the other evidence
14 in deciding whether the defendants acted knowingly.
15 It is not necessary for the government to prove
16 that the defendants knew that a particular act or
17 failure to act was a violation of the law. In
18 other words, the government does not have to show
19 that the defendants knew that the materials were
20 designated as a hazardous waste under a particular
21 statute or regulation.

22 Although the government does not need to prove
23 that the defendants knew that the materials were
24 hazardous wastes, the government must prove that
25 the defendants knew that the materials had the

1 substantial potential to be harmful to others or
2 the environment.

3 Now, in order to treat, store, or dispose of a
4 hazardous waste under RCRA, the defendants must
5 have either received a permit from EPA or New York
6 State allowing such treatment, storage, or disposal
7 of the waste, or have been granted interim status.

8 In order to qualify for interim status, the
9 defendants must have notified EPA or New York State
10 that they operated a hazardous waste treatment
11 storage or disposal facility and filed an
12 application for a hazardous waste treatment storage
13 or facility permit. All right.

14 Go to that, take a look at it, just to make
15 sure that you know we're talking about these RCRA
16 counts now.

17 Now, the entrapment by estoppel defense applies
18 here as well. Okay. To refresh your
19 recollection -- we talked about it in the context
20 of what charges? 1 through 15, right? Now we're
21 dealing with 17, 18 and 19.

22 To refresh your recollection, the entrapment by
23 estoppel defense is available to defendants who can
24 establish by a preponderance of the evidence --
25 remember that -- that the government procured their

1 commission of the illegal acts by leading them to
2 reasonably believe that they were authorized to
3 commit them. The defendants have the burden of
4 proving the entrapment by estoppel defense by a
5 preponderance of the evidence, and that means that
6 it is more likely than not true.

7 Okay. So, we're talking about Counts 1 through
8 15, 17 through 19. Entrapment by estoppel defense
9 may apply, but the defendants have to prove it by a
10 preponderance of the evidence. And that defense
11 applies equally to all of those counts.

12 Now, there's what's called an aiding and
13 abetting statute, and that's Section 2. And that
14 will appear -- you'll see that number, Title 18
15 Section 2 appear in the indictment. And that
16 statute will follow some of the other reference to
17 in violation of such-and-such a title and section,
18 and then will be followed by Title 18, Section 2.

19 And that statute provides that (A) whoever
20 commits an offense against the United States, or
21 aids, abets, counsels, commands, induces, or
22 procures its commission is punishable as a
23 principal; and (B) whoever fully causes an act to
24 be done, which, if directly performed by him or
25 another, would be an offense against the United

1 States, is punishable as a principal.

2 What that means is under the aiding and
3 abetting statute it is not necessary for the
4 government to show that a defendant physically
5 committed the crime with which the defendant is
6 charged in order for the government to sustain its
7 burden of proof. A defendant who aids or abets
8 another to commit an offense is just as guilty of
9 the offense as he committed -- as if he committed
10 it himself.

11 So, you may find, for example, defendant Mark
12 Kamholz guilty of the offenses charged if you find
13 beyond a reasonable doubt that the government has
14 proven that another person actually committed the
15 offense with which defendant Kamholz is charged,
16 and that the defendant aided or abetted that person
17 in the commission of the offense.

18 So, I think you can see the first requirement
19 is that you find that another person has committed
20 the crime charged. Obviously, no one can be
21 convicted of aiding or abetting the criminal acts
22 of another if no crime was committed by the other
23 person in the first place. But if you do find that
24 a crime was committed, then you must consider
25 whether defendant Kamholz aided or abetted the

1 commission of that crime. And in order to aid or
2 abet another to commit a crime, it is necessary
3 that the defendant knowingly associate himself in
4 some way with the crime and that he participated in
5 the crime by doing some act to help make the crime
6 succeed.

7 To establish that defendant knowingly
8 associated himself with the crime, the government
9 must establish that the defendant knew that the
10 offenses described in Counts 1 through 19 of the
11 indictment were committed. To establish that the
12 defendant participated in the commission of the
13 crime, the government must prove that the defendant
14 engaged in some affirmative conduct or overt act
15 for the specific purpose of bringing about the
16 crime. The mere presence of the defendant where a
17 crime is being committed, even coupled with
18 knowledge by the defendant that a crime is being
19 committed, or merely associating with others who
20 are committing a crime is not sufficient to
21 establish aiding and abetting.

22 One who has no knowledge that a crime is being
23 committed or is about to be committed, but
24 inadvertently does something that aids in the
25 commission of a crime is not an aider and abettor

1 An aider and abettor must know that the crime is
2 being committed and act in a way which is intended
3 to bring about the success of the criminal venture.
4 And to determine whether a defendant aided or
5 abetted the commission of a crime with which he is
6 charged, ask yourself these questions: Did he
7 participate in the crime charged or something he
8 wished to bring about? I'll read that again. Did
9 he participate in the crime charged as something he
10 wished to bring about? Second, did he knowingly
11 associate himself with the criminal venture? And
12 third, did he seek by his actions to make the
13 criminal venture succeed? If he did, then the
14 defendant is an aider and abettor, and therefore
15 guilty of the offense.

16 If, on the other hand though, your answer to
17 any one of these questions is no, then the
18 defendant is not an aider and abettor, and you must
19 find him not guilty as an aider and abettor.

20 There's something called venue, and with
21 respect to the elements that we've already talked
22 about, you must consider whether any act in
23 furtherance of the crimes occurred within the
24 Western District of New York. But, you're
25 instructed by me that Erie County and the city of

1 Buffalo metropolitan area are within the district
2 17-county territorial area. So in that regard, the
3 government need not prove that the crime itself was
4 committed in this district or the defendant himself
5 was present here.

6 It is sufficient to satisfy this element if any
7 act in furtherance of the crime occurred within
8 this district.

9 If you find that the government has failed to
10 prove that any act in furtherance of the crime
11 occurred within this district, or if you have a
12 reasonable doubt on this issue, then you must
13 acquit.

14 While we are on the subject of the elements --
15 and remember I told you have to take it, look at
16 each count. The indictment will have dates in it.
17 And in that regard, it really doesn't matter if the
18 indictment charges that a specific act occurred on
19 or about a certain date and the evidence indicates
20 that, in fact, it was on another date. The law
21 only requires a substantial similarity between the
22 dates alleged in the indictment and the date
23 established by testimony or exhibits.

24 Okay. So you got to be close, bottom line.
25 All right. You're going to get the indictment.

1 You know how to use it. It's not proof. And it is
2 your guide for your deliberations and to know
3 whether the government has satisfied its burden of
4 proof beyond a reasonable doubt.

5 Tomorrow you're going to start your
6 deliberations, okay? I'm going to let you go this
7 afternoon. Maybe even a little bit earlier than
8 you expected. But it's a little snowy out there,
9 so we'll give you the opportunity to enjoy those
10 flakes. And be careful on your way home. You
11 know, we hope you can get up and running and
12 started promptly. Is it any difficulty for you
13 getting here by 9:30? You can do that? You're
14 used to that. We'll get you started then. We'll
15 probably have you report here, and we'll make sure
16 we're altogether and nothing else is interfering
17 with your getting started. And as soon as you're
18 assembled, if I can get you in earlier -- I don't
19 have a calendar tomorrow, right? -- so we can -- we
20 can start at 9:30. And as soon as we're ready,
21 we'll get you started with the deliberations.

22 You know, we'll help you in every way we can.
23 We're going to get all the exhibits assembled.
24 You'll get everything. I'm going to send in the
25 board with the photographs of the witnesses for

1 your guidance. And you'll have an exhibit list,
2 you'll have the exhibits. We will ask you to work
3 hard on the testimony. We don't really have a
4 written record of everything that's done here.
5 We'll help out. If you need some help, you know,
6 we will ask you to be specific.

7 Our communications will no longer be this way
8 for the most part. Once you have your foreperson
9 in place, there will be written communications
10 between you and me. Your foreperson will be
11 required to sign a note, send it to me. I'll look
12 at the question. I'll usually respond in writing.
13 That should resolve it. But if there's more to do,
14 we'll bring you back in here after I discuss
15 matters with the attorneys, and I'll speak to your
16 foreperson. And he or she will make sure that
17 everything gets properly communicated back and
18 forth.

19 And the reason for that is because you take on
20 a different status when you're in deliberations. I
21 mean, nobody, nobody can interfere with those
22 deliberations. Chris will be around, but he
23 obviously is outside the room. He does not
24 participate. He will not speak with you. You just
25 go about doing your business, because it is that

1 sacrosanct, that important.

2 But if there's anything we can help you with,
3 make it a specific as you can. We will try to find
4 whatever you want. But we urge you to just take a
5 deep breath when you start out, and then listen to
6 everybody. If there's an issue, go from one person
7 to another. Just try to get it resolved, work it
8 through yourself, look at that indictment. I mean,
9 do you know anybody that could have repeated the
10 same things so many times as I just did with you?
11 Probably not humanly possible. But you've got the
12 framework. Now you go right into it, and you start
13 figuring out for yourselves how you want to go
14 about getting all these matters resolved.

15 You know, if we do have communications in the
16 courtroom or by note, don't tell me, if you take a
17 vote, what the votes are. We're not supposed to
18 know that. You have to work through that yourself.
19 That's all confidential information. So you work
20 through it until you get to the point where you can
21 advise me by note, and Chris will carry it to me
22 stating that you have your unanimous verdict on the
23 indictment in this particular case.

24 All right. Remember your limitations are
25 really just a few, but they're critical, and that

1 is you decide the case on the evidence or the lack
2 of evidence. You know what the evidence consists
3 of. You have to hold the government to its burden
4 of proof. If you find with respect to the defense
5 that's been argued to you, the entrapment by
6 estoppel defense, you have to be satisfied that the
7 defendant has proven that by a preponderance of the
8 evidence. So you've got to keep all these
9 definitions, concepts, burdens separate. But
10 remember the defendants are presumed innocent until
11 and if proven guilty to your satisfaction beyond a
12 reasonable doubt.

13 Each of you winds up deciding this case for
14 yourself. I mean, that's -- that's critical here.
15 And, you know, to do that that involves being
16 willing to share your views, exchange with others,
17 being respectful of each other. I mean, you spent
18 a lot of time together. And so far everybody seems
19 to be still healthy and getting along and all that
20 kind of stuff. So very, very important that you
21 continue in that fashion.

22 Keep in mind that while you decide the case for
23 yourself, you remain entitled to your own opinion.
24 You know, we urge you to exchange your views.
25 That's the purpose of deliberation. That purpose,

1 discuss and consider the evidence, listen to the
2 arguments of your fellow jurors, present your
3 individual views, consult with one another, and
4 then reach an agreement based solely or wholly on
5 the evidence, if you can do so without violence to
6 your own individual judgment.

7 Each of you must decide the case for yourself,
8 and after consideration with your fellow jurors of
9 the evidence in this case. But you should not
10 hesitate to change an opinion which, after
11 discussion with your fellow jurors, appears
12 erroneous.

13 However, if after careful consideration of all
14 the evidence and the arguments of your fellow
15 jurors you entertain a conscientious view that
16 differs from the others, you are not to yield your
17 conviction simply because you are outnumbered. But
18 your final vote must reflect your conscientious
19 conviction as to how the issue should be decided.
20 And again, your verdict, whether guilty or not
21 guilty, should be unanimous.

22 Make sure you stay away from any social media,
23 any publicity, any investigation, anything that is
24 outside of what you've been presented with by way
25 of evidence here in this court.

1 You know, we told you from the beginning
2 everything you will need you will hear, see,
3 observe, be given within the four walls of this
4 courtroom. And again, it would be a violation of
5 your oath as jurors to allow yourselves to be
6 influenced by anything outside of this courtroom,
7 including publicity.

8 Don't have any discussions, no outside contact.
9 If you want me to be more specific -- I love
10 reading this charge, because I'm not sure I'm
11 conversant in all of these. But you must not
12 communicate with or provide any information to
13 anyone by any means about this case. You may not
14 use any electronic device or media such as
15 telephone, cellphone, Smartphone, iPhone,
16 BlackBerry, or computer, the Internet, any Internet
17 service, or any text or instant messaging service,
18 or any Internet chatroom, blog or Web site such as
19 Facebook, Myspace, LinkedIn You Tube or Twitter to
20 communicate to anyone any information about this
21 case or to conduct any research about this case
22 until I accept your verdict.

23 In other words, you cannot talk to anyone on
24 the phone, correspond with anyone or electronically
25 communicate with anyone about this case. You can

1 only discuss the case in the jury room with your
2 fellow jurors during deliberation. And I expect
3 that you will inform me as you become aware of
4 another juror's violation of these instructions if
5 that ever happens.

6 You may not use the electronic means to
7 investigate or communicate about the case because
8 it's important that you decide this case based
9 solely on the evidence presented in the courtroom.
10 Information on the Internet or available through
11 social media might be wrong, incomplete, or
12 inaccurate. You are only permitted to discuss the
13 case with your fellow jurors during deliberations,
14 because they have been here with you, seen and
15 heard the same evidence that you have.

16 In our judicial system it is important that you
17 are not influenced by anything or anyone outside of
18 the courtroom. Otherwise, your decision may be
19 based on information known only by you and not your
20 fellow jurors or the parties in the case.

21 Ultimately, what's wrong with that? That would be
22 unfair and possibly adversely impact the judicial
23 process.

24 So you start, get your jury foreperson in
25 place. And that person will be responsible for

1 deciding how to proceed with your job that lies
2 ahead and for signing all the communications with
3 me if any of those arise before you're ready to
4 return your unanimous verdict.

5 And when you do have a verdict ready, you hand
6 that, the signed note to -- well, the note to the
7 court security officer.

8 Chris, are you going to be here tomorrow?

9 COURT SECURITY OFFICER: Yes, sir.

10 THE COURT: And he'll bring the note to
11 me. And then you'll have the indictment [sic].
12 You'll take it on a count-by-count basis. You'll
13 date it and sign it as you proceed through each
14 count until you're finished with the full
15 consideration of the evidence.

16 Remember, your answers to all aspects of the
17 consideration of each count of the indictment must
18 be unanimous, and then we'll take the return of the
19 indictment [sic] in the courtroom. There is a
20 procedure for doing that. I'll explain how that's
21 done. But once it's received, it's difficult to
22 undo, and we urge you to make sure that when you do
23 return the verdict through your foreperson, that
24 it's done by your foreperson in full reference of
25 the unanimous view of each of you and the entire

1 jury when it comes to a consideration of each of
2 the counts in the indictment.

3 Okay. That's it. But I do need to speak to
4 the attorneys to make sure that I didn't misspeak
5 or didn't leave something out. Or if there's any
6 problem, I'll get that straightened out. But,
7 assuming there's no problem, then we'll let you go
8 for the day, and we'll see you here tomorrow.

9 May I have the attorneys come up, please?

10 (Side bar discussion held on the record.)

11 THE COURT: Mr. Mango, for the government,
12 anything that I need to address?

13 MR. MANGO: Your Honor, I don't know if
14 you need to read this. The one thing I saw that
15 was missed, in charge number 36, which is the Clean
16 Air Act counts, the statutory reference was not
17 read. I know you did read the RCRA statute. The
18 Clean Air Act statute was not read. I don't know
19 if you want to go back to it. We have no
20 preference either way. I just wanted to bring it
21 to your attention that that wasn't read.

22 THE COURT: I probably won't do that. It
23 will appear in the charge. I've got the numbers
24 there, so I think that will suffice.

25 MR. LINSIN: We have no concern about

1 that, your Honor.

2 Just very briefly for the record, your Honor, I
3 do want to note our continuing objection to the
4 Court's failure to include the intent to dispose
5 element with regard to Counts 18 and 19. And as
6 long as we are here on the point, with respect to
7 the special verdict form, our continuing objection
8 to not including the special findings with respect
9 to the defense as to the applicable counts and not
10 including guidance as to the unanimity,
11 particularly as to which action or activity
12 constitutes active management for Count 17. I've
13 made these points before. I just wanted to make
14 them for the record.

15 THE COURT: Understood. The record will
16 so reflect.

17 MR. PERSONIUS: Your Honor, we join in
18 Mr. Linsin's objections.

19 The additional two comments that I have, I
20 think it goes without saying, on page 90 what goes
21 to the jury will need to be -- very end of that
22 will need to be corrected.

23 Mine's different, Judge. My page 90 is -- it's
24 what Andrew provided us with. It would be part --
25 the end of charge 54 where you read the RCRA

1 statute. There's just some --

2 MR. LINSIN: The Court read it
3 differently.

4 THE COURT: I read it differently?

5 MR. LINSIN: You read it would be a
6 violation as I recall, and I think that would be an
7 appropriate amendment or revision rather than shall
8 be punished.

9 MR. MANGO: Well, maybe shall be a crime,
10 leave it at that, instead of a violation.

11 THE COURT: You want me to change -- read
12 that again or just --

13 MR. PERSONIUS: No, I don't think it's --
14 no, just what goes to the jury, please.

15 And then, your Honor, the only other -- we
16 talked about just to make sure that with the 82,
17 however we handle it with the D018 --

18 THE COURT: Yes.

19 MR. PERSONIUS: -- to make that change.

20 THE COURT: Yes. Okay. I can take care
21 of that. That's it?

22 MR. PERSONIUS: Yes, Judge.

23 MR. LINSIN: That's it.

24 THE COURT: Okay. Thank you very much.

25 MR. PERSONIUS: Thank you, Judge.

1 (End of side bar discussion.)

2 THE COURT: Okay. We're pretty close.

3 I'll just tell you what happened. I was overruled.

4 I wanted to reread all of the instructions, and the

5 attorneys overruled me. They thought you might

6 appreciate going home tonight instead. So being

7 overruled, we're going to let you do that. Get a

8 good night sleep. Be safe going home. Be safe

9 coming back. Don't do anything to disturb the

10 impartiality, the openmindedness, the real

11 dedication and engagement that you put into this

12 case, and we look forward to getting you started no

13 later than 9:30 tomorrow morning, okay? All right.

14 Thank you very, very much. We'll see what

15 time?

16 THE JURY: 9:30.

17 THE COURT: Okay. Didn't want to let that

18 go for the last night. We'll see everybody here

19 tomorrow. Yes?

20 A JUROR: Do the alternates have to come

21 back?

22 THE COURT: They do have to come back in

23 case somebody else doesn't. That's an added part

24 of the insurance policy. Guys, just hang in there,

25 and I know you've been engaged as well. Okay.

1 Thank you very much. We'll see you tomorrow. Be
2 good.

3 (Jury excused from the courtroom.)

4 THE COURT: Thank you. You're free to go.
5 But there might be a few things we want to talk
6 about?

7 MR. LINSIN: There is --

8 THE COURT: Have a seat.

9 MR. LINSIN: There's really only one
10 question, just very quickly, your Honor. For our
11 planning purposes once the jury retires to
12 deliberate tomorrow, is it the Court's practice to
13 permit us to be on 15- or 20-minute call? How does
14 that Court wish to plan for that? We just need to
15 make arrangements.

16 THE COURT: Yeah. I mean, what I prefer
17 is that you're as close in proximity to the
18 courthouse -- I mean, if it's 15 minutes or
19 whatever, that's fine. You probably want to go
20 back to the hotel.

21 MR. LINSIN: We're just at the Hyatt. It
22 should not --

23 THE COURT: That works fine.

24 MR. LINSIN: Fine.

25 THE COURT: But we need contact numbers,

1 your cellphone numbers. Anybody wants to stay
2 closer by, that's fine. There's no telling how
3 this is going to go. But by the time we get
4 everybody reassembled, 15 or 20 minutes is okay.

5 MR. LINSIN: Okay. Thank you.

6 THE COURT: Anything else?

7 MR. MANGO: We'll likely be on the third
8 floor, but I'll leave some numbers to make sure.

9 THE COURT: Okay.

10 MR. PERSONIUS: Your Honor, would you like
11 us to be here before 9:30 tomorrow or at 9:30?

12 THE COURT: You know, I'd like you to be
13 here a few minutes before just in case there's
14 anything that we need to discuss. You never know,
15 something may happen or I might get a note or
16 something. Having you here a little bit early
17 would be helpful. And then, you know, I think it's
18 a good thing for the jury to see you all here. All
19 right. And then I'll send them back to start
20 deliberations. Except you for, Mr. Mango, you can
21 stay home if you -- no, just kidding. So does that
22 work for everybody?

23 MR. PERSONIUS: Yes, Judge, is 9:15 early
24 enough, or do you want us here at 9:00?

25 THE COURT: No. No. 9:15 is plenty

1 early, Mr. Personius. And, you know, I'm confident
2 that we'll do our best to make sure that everything
3 is in order. Colleen will be working with the
4 paralegals because the attorneys have to -- is that
5 already done?

6 THE CLERK: They already signed off.

7 THE COURT: That's great work. We will
8 get everything ready. We'll have it available for
9 the jury. The board with the photographs will go
10 in, and I think, you know, we can't really do
11 anything more than that. You've given it your best
12 efforts. We'll see what happens tomorrow.

13 MR. LINSIN: Thank you, your Honor.

14 MR. MANGO: Thank you very much.

15 THE COURT: Andrew, was there anything
16 else?

17 LAW CLERK: No, Judge.

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CERTIFICATION

I certify that the foregoing is a
Correct transcription of the proceedings
Recorded by me in this matter.

s/Michelle L. McLaughlin
Michelle L. McLaughlin, RPR
Official Reporter
U.S.D.C., W.D.N.Y.